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PREFACE.

For those who are not familiar with this series of Reports, it may be advisable to point out that, in each case, the original is mentioned at the head, and other reports are cited at the end. The headnotes are my own, but, save as to this, the originals are not interfered with in any material respect. Superfluous matter only has been excised: such as the provisions of sections of the Act or the affirmative and negative statements of counsel of an argument that is fully dealt with in the judgments.

Now that we have arrived at the fourth volume, it is thought that a complete digest of all the cases would be useful. I have therefore prepared one, and propose to publish it, with wide margins for notation, under the name of "A Digest of Workmen's Compensation Cases."

THE EDITOR.

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CASES

DETERMINED UNDER

THE WORKMEN'S COMPENSATION ACT, 1897.

NOVEMBER, 1901, TO JUNE, 1902.

November 13, 1901.

BOARDMAN *v.* SCOTT & WHITWORTH.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 502.

Accident in Ordinary Course of Work.—SEC. 1, 1.

A man lacerated the muscles of his back while lifting a heavy beam in the usual and ordinary course of his work.

Held, that the arbitrator was right in holding that the man had been injured by accident.

Lee Boardman v. *Scott & Whitworth* ([1901] 3 W. C. C. 33) affirmed.

THIS was an appeal by the respondents from the award of the County Court Judge at Manchester.

The facts appear in the report, (1901) 3 W. C. C. 33.

The respondents appealed.

A. Powell, for the appellants: The workman was doing his ordinary work in the usual way, and there was no fortuitous or unexpected event which caused the injury. The injury is not caused by "accident" unless it is caused by some

fortuitous "external" event. In this case there was nothing fortuitous, or external to the workman himself, which caused the injury: *Hensey* v. *White* ([1900] 2 W. C. C. 1), *Lloyd* v. *Sugg & Co.* ([1900] 2 W. C. C. 5), *Walker* v. *Lilleshall Coal Company* ([1900] 2 W. C. C. 7), *Roper* v. *Greenwood* ([1901] 3 W. C. C. 23), *Timmins* v. *Leeds Forge Company* ([1900] 2 W. C. C. 10).

E. Browne, for the respondent, was not called upon.

COLLINS, M.R.: I think that this is a perfectly clear case of accident. It seems to me that all the cases which were cited agree, and are contrary to the contention of the appellants. I think that there are here all the elements of an accident. The facts were as follows:—The workman was in a normal state of health at the time of the accident. The accident arose whilst he was lifting a beam of about 100lb. weight. This was part of his ordinary duty, and he had done it successfully on many occasions. Whilst lifting this beam, he suddenly tore several muscles of his back. He said, in his evidence, that he was in the act of lifting the beam on to his shoulder when he found it was unevenly balanced, and that he gave it an extra lift up to get it on to his shoulder, and felt his back crack. The workman was obliged to meet a sudden emergency by a sudden motion, which resulted in a strain and consequent injury. In this case all the elements are to be found which were said to be necessary to constitute an "accident" in the cases which have been cited. In my opinion this case is a good illustration of an accident. I think that the decision of the County Court Judge was perfectly right, and that this appeal must be dismissed.

STIRLING, L.J.: I agree.

MATHEW, L.J.: I think that, in determining the question whether the injury has been caused by an "accident" or not, we must discriminate between that which must occur and that which need not necessarily occur in the course of the employment. If the thing must happen it is not an accident, but, if it need not happen, then there is the fortuitous

element, and there is an accident. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W. Hurd & Son;* for the respondent, *Indermaur & Brown,* for *Gardner & Son,* Manchester.

Also reported (1902) 1 K. B. 4; 71 L. J. K. B. 3; 65 L. T. 502; 50 W. R. 184; 66 J. P. 260.

The appeal in *Perry* v. *Baker* ([1901] 3 W. C. C. 29) was on June 4, 1902, withdrawn, the applicant receiving compensation.

October 9, 1901.

CHEEK *v.* HARMSWORTH BROS.

Before His Honour JUDGE ADDISON, K.C.

The Times, October 10, 1901.

Accident—Probability of Injury.—SEC. 1, 1

Dermatitis brought on by washing out ink-cans with a solution of caustic soda without the use of proper gloves is not an accident.

AT the Southwark County Court, Philip Cheek, a labourer, sought to recover compensation from Harmsworth Brothers for injury to his hands, which had incapacitated him from following his employment.

The applicant's case was that he was employed to wash out ink-cans with a strong solution of caustic soda. His india-rubber gloves, which were to protect his hands from the soda, wore out, and he applied once to the foreman for another pair, but they were not supplied. He went on working, and occasionally covered his hands with old linen, but they got very sore, and he was advised by the foreman to consult a doctor. He went to Guy's Hospital, and was informed that he was suffering from dermatitis. Eventually his hands became so inflamed that he was unable to continue at work.

Lambert, for the applicant, contended that the disease came within the Act, as it was "personal injury by accident."

Arthur Powell, for the respondent, did not call any evidence. What did the word "accident" mean? In some senses the word would cover everything that happened.

HIS HONOUR: We must take the meaning of the word in this Act.

Powell agreed, and added that the word could not be taken in the dictionary or its widest sense. It had been held, for instance, that a man who was smitten with sunstroke and died as the result did not meet with an accident. To prove an accident they must show something which was fortuitous and unforeseen; something that happened not in the ordinary course of things; but the element of fortuity did not necessarily constitute an accident. The applicant could no more be said to have met with an accident than a man who caught smallpox. An accident within the meaning of the Act must be something which happened at one time by one stroke, and must be appreciable as such by the ordinary senses of mankind at the moment.

HIS HONOUR, after reviewing the evidence, said there was nothing in the facts stated that anybody could call an accident in any reasonable sense of the word used in the Act. Therefore he was compelled to find for the respondents with costs. He would, however, fix the compensation to which the plaintiff would be entitled if there was an appeal and this decision was reversed at 14*s.* 6*d.* per week until the incapacity ceased.

June 6, 1902.

ARMITAGE *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 883.

Arising out of and in the Course of the Employment.—SEC. 1, 1.

A. maliciously threw a piece of iron at B., which struck the eye of C., who was at work.

Held, that the accident to C. did not arise out of and in the course of the employment.

THIS was an appeal by the respondents in the County Court from the award of the County Court Judge at Manchester.

The applicant was an apprentice in the employment of the appellants. The applicant was at work at the appellants' carriage works, where a number of other boys were employed. Harrop, one of these boys, while "larking," pushed Smith, another boy, into a pit, and Smith in anger threw a piece of iron, which was lying in the pit, at Harrop. The piece of iron missed Harrop, but hit the applicant, injuring his eye so seriously that it had to be removed. When this accident happened the applicant was properly engaged in doing his work.

The County Court Judge found that the accident arose out of and in the course of his employment.

The appellants appealed.

C. A. Russell, K.C., and *Spencer Hogg* for the appellants: This accident was caused by the wilfully wrongful act of another workman in the same employment, which had no relation whatever to the employment, and was not within the scope of the employment. The accident must be one of the risks which is incident to the employment. If the accident arises from the act of another workman done within

the scope of the employment, it arises "out of" the employment; but, if it arises from an act done by another workman entirely outside of the employment, then it does not arise "out of" the employment. In Scotland it has been held, by a majority of the Judges, that an accident caused to a workman by the "horse-play" of his fellow-workmen did not arise "out of" the employment: *Falconer* v. *London and Glasgow Engineering, etc., Company* (3 F. 564).

A. Powell, K.C., and *McCleary* for the respondents: This accident did arise "out of" the employment. It is immaterial whether it arose from the act of another workman within the scope of the employment or not. Where a number of boys are employed together it is a risk incident to the employment that things will be thrown about and injury caused thereby. An accident arising in that way is one of the risks of the employment, and is an accident which is likely to happen.

Russell, K.C., replied.

COLLINS, M.R.: The question is whether the accident could properly be held, as a matter of law, to have arisen out of the employment. It seems to me that it cannot. An act done by some one who happens to be in the same employment, which has no relation to that employment, but was a wrongful act and was intended to be a wrongful act against another person in the same employment, is not, in my opinion, within the scope of the employment as part of the risks of the employment. The Act does not provide an insurance against everything that may happen to the workman while he is employed. The injury must be caused by accident arising "out of the employment." I think that the test suggested by Mr. Russell as a guide—that is, to see whether the act which caused the injury and was done by a person in the same employment was done entirely outside of his employment or not—is a very useful test. Does the Act intend to protect a workman in the case of accidents arising from acts done by persons in the same employment, although they have no relation to the employment and may

have been done to satisfy a grudge or from anger? It seems to me that in such a case the accident would not arise "out of and in the course of the employment." It would not be incident to the employment at all. It would be entirely outside the scope of the employment of the doer of the act and of the injured workman. This kind of case has been carefully considered in Scotland in *Falconer* v. *London and Glasgow Engineering Company* (*sup.*); and the judgment even of the dissenting Judge in that case seems to be consistent with our decision in this case. It seems to me, as a matter of law, that we cannot say that the injury caused by a missile thrown by another workman entirely outside of the scope of his employment was caused by an accident which arose out of the employment. I think, therefore, that the learned County Court Judge misdirected himself, and that this appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., gave judgment to the same effect.

Appeal allowed.

Solicitors for the appellants, *Woodcock, Ryland, & Parker,* for *Moorhouse,* Manchester; for the respondent, *Chester, Broome, & Griffithes,* for *Chapman & Brooks,* Manchester.

Also reported in (1902) 2 K. B. 178; 86 L. T. 883; 18 T. L. R. 648.

November 9, 1901.

FITZPATRICK *v.* HINDLEY FIELD COLLIERY COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Employment—In the course of—Commencement.—SEC. 1, 1.

A miners employment has commenced when he has obtained his pit-lamp and his "tallies," and is waiting at the pit brow to descend.

THIS was an appeal by the respondents in the County Court from the decision of his Honour JUDGE BRADBURY, sitting at Wigan on March 19, 1901

The facts of the case and his Honour's decision are reported (1901) 3 W. C. C. 37, 39.

Horridge, K.C., and *F. E. Smith*, for the appellants, argued that the employment of the applicant had not at the time of the accident commenced. It would not commence until he left the ground to go down the pit.

[MATHEW, L.J.: He had got his lamp and "tallies," and was waiting to descend.]

He arrived at the pit's mouth earlier than he need have done.

[COLLINS, M.R.: I should suggest that there must be a certain margin of unpunctuality allowed, and if he is on the premises before he has to do his work, and during that time the accident arises, it arises out of and in the course of his employment.]

They cited *Holmes* v. *Great Northern Railway Company* ([1900] 2 W. C. C. 19), *Davies* v. *Rhymney Iron Company* ([1900] 2 W. C. C. 22), *Smith* v. *Lancashire and Yorkshire Railway Company* ([1899] 1 W. C. C. 1).

Ruegg, K.C., and *Minton-Senhouse*, for the respondents, were not called on.

COLLINS, M.R.: I think this appeal must be dismissed. I desire to add nothing to the judgment of the learned Judge, which appears to me to deal exactly with the right points, and to come to the right conclusion on the arguments that were addressed to him.

STIRLING, L.J.: I agree.

MATHEW, L.J.: I am of the same opinion.

Solicitor for the applicant, *Happold*, for *Dootson*, Leigh, Lancs.; for the appellants, *Rowcliffes, Rawle, & Co.*, for *Peace & Ellis*, Wigan.

Not elsewhere reported.

June 10, 1902.

JESSON *v.* BATH.

Before His Honour JUDGE ATKINSON.

113 *Law Times*, 206.

Arising out of and in the course of—Going to Work.—SEC. 1, 1.

A fruit-picker on piecework was told to stop what she was doing and go to work at another part of the farm. While proceeding along a "headland," a sort of farm road, she met with an accident.

Held, that the accident arose out of the employment.

R. D. Workman and *H. M. Giveen*, for the applicant, cited *McNicholas* v. *Dawson & Son* ([1899] 1 W. C. C. 80), *Holmes* v. *Great Northern Railway Company* ([1900] 2 W. C. C. 19).

J. D. Crawford, for the respondent, cited *Hensey* v. *White* ([1900] 2 W. C. C. 1), and *Smith* v. *Lancashire & Yorkshire Railway Company* ([1899] 1 W. C. C. 1).

The facts appear in his Honour's reasons for the award.

HIS HONOUR: This is an important case. I would therefore have liked to have taken time to consider my judgment, but, as that would cause delay of a month, I will give the best judgment I can now. The applicant was employed as a fruit-picker on piecework. The foreman directed her to leave off picking raspberries and go to another part of the farm to pick peas. She delivered the raspberries at the weighing place, and proceeded to the place where she was to pick peas. She required a basket, and to get it had to pass over a part of the farm which is called the "headland" of the strawberry field, and intended as a farm road. It appears that the land had been ploughed by a plough leaving no furrow. The applicant was properly proceeding along this roadway for the purpose of doing what she was directed and employed to do, when she fell over a lump of earth, and her thigh was fractured by the fall. In accordance with the decision of *Hensey* v. *White* (*sup.*), this accident is one to which the Workmen's Compensation Act, 1900, applies.

The accident occurred from a fortuitous and external cause—namely, the fall over the lump of earth. I quite agree that the accident must occur at a time when the workman is engaged on work incident to the employment. The applicant was in one part of the farm, and directed by the employer to go to another part of the same farm, and while going she met with this accident; it happened when she was doing something incident to the employment, for she could only go this way and had to go. It may be that, if a workman was sent from London to do work at Liverpool and was injured by an accident on the railway through the negligence of the company while going to Liverpool, possibly his employer would not be bound to compensate him under these Acts; for in that case the immediate cause of the injury would be the negligence of the railway company, and this intervening cause might well be held to establish that the injury did not arise either out of or in the course of the employment: see *Armitage* v. *Lancashire & Yorkshire Railway Company* (*ante*, p. 5). I am by no means sure, however, that if the injury was occasioned by pure accident while the workman was on the road to Liverpool, the case would not be within the statute. In this particular case, however, the accident happened on the premises of the respondent, and the case of *Holmes* v. *Great Northern Railway Company* (*sup.*) supports my decision.

Compensation awarded accordingly.

Solicitors for the applicant, *Alfred Slater*; for the respondent, *C. J. Parker.*

April 15, 1902.

ELLIOTT *v.* LIGGINS.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ

18 *T. L. R.* 514.

Action for Wages—Compensation paid.—SEC. 1, 1.

Acceptance of compensation debars the right to wages which would otherwise be due.

THIS was an appeal by the defendant from a portion of the judgment of the Judge of the Coventry County Court in an action for wages. The appeal raised the question whether a workman who had received the *maximum* compensation under the Workmen's Compensation Act, 1897, was entitled in addition to sue his employer for wages under his contract of employment in respect of a period which was subsequent to the accident, and in respect of which he had received compensation under the Act. The workman, the respondent, became a servant of the appellant on November 5, 1900, at 35*s.* a week, with a bonus in certain events which did not arise. He worked under that agreement till July 11, 1901, when he met with an accident and was disabled. On August 13 he served notice of the accident and of a claim for compensation under the Workmen's Compensation Act. By agreement between himself and his employer he was awarded the full amount allowed by the statute—namely, 17*s.* 6*d.* a week or half his wages during incapacity. On November 2, 1901, the employer gave the workman a week's notice. The workman then sued him in the County Court for £15 3*s.* 4*d.* in respect of wages alleged to be due between July 11 and November 9—namely, for the other 17*s.* 6*d.* a week. He had not in fact worked between those dates, but the County Court Judge gave judgment for him for this amount. The workman also claimed wages between November 9 and December 25, but this claim was disallowed.

Thirdly, he claimed a quarter's wages in lieu of notice. Under the third head the County Court Judge gave him a month's wages. The employer appealed from so much of the decision as related to half the wages between July 11 and November 9. For the appellant it was contended that the workman had chosen his own method of compensation, and could not, after receiving the benefit of it, sue the employer for the other half of his wages. For the respondent it was argued that the contract of service lasted till November 9, and the respondent would, if there had been no Workmen's Compensation Act, have been entitled to his full wages, though he was prevented by illness from working (*Cuckson* v. *Stones* (28 L. J. Q. B. 25)), and there was nothing in the Act taking away any of his rights under the contract.

J. J. Parfitt was for the appellant; *H. Newson* for the respondent.

The LORD CHIEF JUSTICE, in giving judgment, said that this case was another illustration of the fact that one ought not to expect to find in this Act a complete code dealing with every single case, and he was not sure that it would be to the interest of the workman that the respondent's contention should prevail, because it would in many cases lead to notice being given by the employer. The Court had to look to the broad intent of the Act in applying its provisions. Section 2 provided that proceedings for compensation under the Act should not be maintainable unless notice had been given, and there were several sections which provided that the parties might agree to the compensation, and therefore proceedings did not cease to be proceedings under the Act because they had resulted in a bargain contemplated by the Act. Paragraph 1 (*b*) of the first schedule to the Act provided that where incapacity for work resulted, the compensation should be a weekly payment not exceeding half the weekly earnings. These provisions and the giving of notice and the receipt of compensation under those provisions were inconsistent with the view that the original wages were to go on during the time of incapacity. If they

were to go on there was no necessity for an inquiry under paragraph 2 of the first schedule as to what was the difference between the earnings before and after the accident, and as to whether there was any payment by the employer other than wages during incapacity. The workman, who was taking the benefit of the Act on the ground of incapacity, and had had that amount assessed could not accept his compensation and then claim also to have his wages during all that time. The judgment of £15 3*s.* 4*d.* in favour of the workman ought not to stand, and the appeal ought to succeed.

DARLING, J., in agreeing, said that the right to make a claim under the Act was founded on the basis that, where wages had ceased because of injury, a sum was payable calculated on the wages which the man had been earning, in order to arrive at the amount of damage done him. That amount was payable in lieu of wages lost. If the plaintiff was right, he would logically be entitled to his full wages and compensation in addition, because he could not earn them. It was impossible to suppose that the Legislature ever intended any such consequence. This decision, although actually against this particular workman, was not opposed to the interest of workmen as a class, because if the Court were to decide otherwise employers would always discharge them at once after an accident.

CHANNELL, J., in agreeing, said that he thought that the plaintiff was estopped from saying that his wages were payable.

The appeal was accordingly allowed, with costs.

Also reported (1902) 2 K. B. 84; 71 L. J. K. B. 483; 87 L. T. 29; 50 W. R. 524.

November 8, 1901.

REEKS *v.* KYNOCH (LIMITED).

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 34.

Serious and Wilful Misconduct.—SEC. 1, 2 (*c*).

A boy was working at a machine used for cutting screws. He leaned over a circular saw, which was in motion, to pick up an uncut screw which had fallen from its place, and in doing so injured his finger. He had been frequently told not to put his hand across the saw.

Held, that there was evidence that, though he was negligent, he was not guilty of serious and wilful misconduct.

THIS was an appeal from an award of the Judge of the Birmingham County Court.

The injured workman was a boy of the age of nineteen, and he had been in the service of the employers for ten weeks. While working at a machine used for cutting or slitting screws he leaned over a circular saw, which was in motion, for the purpose of picking up an uncut screw which had fallen from its place, and in so doing he injured one of his fingers. He had been frequently told by his employers that he ought not to put his hand across the circular saw. He brought an action against his employers under the Employers' Liability Act, claiming damages on the ground of want of proper fencing to dangerous machinery.

The jury found that the plaintiff had been guilty of contributory negligence, and judgment was entered for the defendants accordingly.

The plaintiff's counsel then asked the County Court Judge to make an award under the Workmen's Compensation Act.

It was contended on the part of the employers that the workman had been guilty of serious and wilful misconduct.

The County Court Judge held that, although the workman

had been negligent, he had not been guilty of serious and wilful misconduct, and made an award in his favour.

The employers appealed.

Stamford Hutton for the employers; *J. B. Matthews* for the applicant.

The COURT dismissed the appeal.

The MASTER OF THE ROLLS said it seemed to him on the facts of the case that there had been no miscarriage of justice, and he saw no reason for reversing the decision of the County Court Judge. The applicant was a boy of nineteen, and he was in employment which obliged him to work with his hands near a circular saw. One of the screws which he was cutting having fallen out of its place, he leaned across the saw to recover it. No doubt he had been forbidden to do such a thing, but the facts did not constitute evidence of serious or wilful misconduct. The *primâ facie* inference arising on the facts was that the element of wilfulness did not enter at all into what he did, but that he acted on a sudden impulse.

The LORDS JUSTICES delivered judgment to the same effect.

Solicitors for the plaintiff, *Ford & Ford*, for *A. J. O'Connor*, Birmingham; for the defendants, *William Morris*, Birmingham.

Also reported 50 W. R. 113; 18 T. L. R. 34.

November 7, 1901.

JOHN *v.* ALBION COAL COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 27.

Serious and Wilful Misconduct.—SEC. 1, 2 (*c*).

The way out of a mine was along the main haulage road. There were manholes at intervals of 20 yards. A number of men were walking along the road when a "journey" of waggons started. One of the men advised the deceased to enter the first manhole, but he did not do so, and continued with the others. He had gone a distance of 138 yards, having

passed six other manholes, when he was overtaken and killed by the waggons.

Held, that there was evidence of serious and wilful misconduct.

THIS was an appeal by the applicant from the decision of the Pontypridd County Court Judge.

The applicant was the widow of a labourer employed by the respondents in their colliery.

It appeared that the deceased man, on leaving his work in the pit, would have to walk along the main haulage road in the colliery. That was the road along which coal, when worked, was taken out of the pit by means of trams. The "journey" of trams (that was to say, a number of waggons fastened together) was hauled by a rope. At the side of the main haulage road there were a number of manholes, placed at intervals of 20 yards apart as required by section 49, rule 14, of the Coal Mines Regulation Act, 1887. On the day in question the deceased man, who was 45 years of age, and who had been in the respondents' employment at the colliery for about four years, was leaving his work near the bottom of the pit and was walking along the main haulage road. There were some other men also walking along the road. While the deceased was doing so, the rope began to move, and the journey of trams started along the road. One of the men at the first manhole told the deceased man to come into the manhole as the journey of trams was not far off. The deceased man refused to do so, and said that he would follow the rest, and walked on. After this he passed six manholes, and had just reached the seventh when the journey overtook him and he was knocked down and killed.

The County Court Judge came to the conclusion that he was guilty of serious and wilful misconduct.

The applicant appealed.

Abel Thomas, K.C., and *Rhys Williams*, for the appellant: The County Court Judge found that the deceased man was guilty of serious and wilful misconduct upon a *dictum* of the late Master of the Rolls in *Rees* v. *Powell Duffryn Steam Coal*

Company (*infra, n.*). That *dictum*, however, was not applicable. There was no evidence upon which the Judge could find serious and wilful misconduct. The deceased man was warned of the coming of the journey at the first manhole, and he had time to pass six other manholes before he was overtaken by the journey. He had very nearly got out of the main haulage road when the journey overtook him. He might have been negligent in going on, but that was not enough. This was the ordinary way out of the pit, and it would be very difficult to work the colliery properly if the journey had to be stopped whenever workmen were going out of the pit. The man very nearly got out of the main haulage road before being overtaken by the journey, and he was merely doing what was very generally done by workmen in the colliery.

Ruegg, K.C., and *Anton Bertram*, for the respondents, were not called upon.

The COURT dismissed the appeal.

The MASTER OF THE ROLLS said that the County Court Judge had found that the deceased man was guilty of serious and wilful misconduct. That was a question of fact. This Court had no jurisdiction to entertain an appeal on a question of fact. The only way in which his finding could be questioned was by showing that there was no evidence upon which he could so find. The learned counsel for the appellant accepted that view, but he also relied upon a part of the judgment of the County Court Judge which, he said, qualified his finding that the deceased man was guilty of serious and wilful misconduct, and showed that he would not have arrived at that finding if he had been at liberty to decide

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REES *v.* POWELL DUFFRYN STEAM COAL COMPANY.

The Times, January 29, 1900.

THIS was an appeal from the decision of Judge Williams, the Judge of the Glamorganshire County Court, holden at Aberdare.

The appellant, Rees, was a collier employed by the respondents, the Powell Duffryn Steam Coal Company.

The appellant, on December 28, 1898, was working as a collier, when

as he thought right. But upon reading the judgment as a whole he (the Master of the Rolls) did not think that that was the right view of it. The County Court Judge was referring to the case of *Rees* v. *Powell Duffryn Steam Coal Company*, which was an appeal from the same County Court Judge. In that case this Court overruled the decision of the Judge, who found the workman guilty of serious and wilful misconduct, and this Court held that there was no evidence to support that finding, and that the man met with an accident which he had no reason to expect. The County Court Judge in the present case examined that case, and came to the conclusion that there was nothing in it which debarred him from finding that the deceased man was guilty of serious and wilful misconduct. It was not right to say that the Judge only so found because he was coerced by the case of *Rees* v. *Powell Duffryn Steam Coal Company*. The only question for the Court was whether there was evidence upon which the Judge could have so found. His Lordship was not going to attempt to lay down any definition of serious and wilful misconduct. The deceased man had been working in the colliery for four years. He was told that there was a risk in going on, as the journey was approaching, and that he had better get into a manhole. He nevertheless went on, knowing what the manholes were there for, and knowing that the men thought it unsafe for him to go on. If it had been a case for a jury, the Judge could not have withdrawn that question from the jury. It was impossible to lay down any rule of law as to what was gross negligence and what was serious and wilful misconduct. There was evidence here upon which the County Court Judge could

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he was ordered to do hauler's work. His lamp went out, and he went to the lamp station to get a light. He then proceeded to return with the lighted lamp towards the place where his work was. He had to walk along an inclined plane or roadway, up which trams were hauled by means of a rope. There was no room to walk between the rail and the side, the distance between the two being only 18 inches, and, therefore, the appellant had to walk between the rails. There were manholes at the

reasonably find as he did, and his Lordship would have come to the same conclusion himself upon the facts.

The LORDS JUSTICES concurred.

Solicitors for the appellant, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas;* for the respondents, *Vazie Simons,* Pontypridd.

Also reported 65 J. P. 788.

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side for the men to take shelter in when a "journey of trams" passed. When the appellant reached the inclined roadway, to go back to the place where he was working, he was told that the journey of trams was coming, and he saw the rope in motion. It would take about three minutes for the journey of trams to do the entire distance. The appellant proceeded along the inclined roadway, and was making for a manhole, when the rope "swamped" across and struck him on the left leg below the knee and broke his leg.

The County Court Judge found that the appellant was guilty of serious and wilful misconduct in travelling along the inclined roadway while the journey of trams was in motion, and made an award in favour of the respondents.

Cripps, Q.C., and *W. D. Benson* for the appellant.

Ruegg, Q.C., and *Arthur Lewis* for the respondents.

The COURT allowed the appeal.

A. L. SMITH, L.J., said that the only question was whether there was any evidence that the injury was attributable to the serious and wilful misconduct of the appellant. It seemed that his lamp went out, and he had to go and get it lighted, and then to go back to his work. He was obliged to go along a tramway which was worked by means of a rope. There was not even evidence that he could not have done what he thought he could do—namely, go a part of the way and then get into a manhole. At any rate, he was not knocked down by the tram. While he was going along the roadway, the rope slipped off and struck him on the leg and broke it. Where was there any possible evidence of serious and wilful misconduct? He went by the only way by which he could go, and he was walking, as he was obliged to do, between the rails, when the rope struck him. The appeal must be allowed.

RIGBY, L.J., agreed. For anything his Lordship knew the appellant might have been negligent, and seriously negligent. But he could see no evidence of serious and wilful misconduct.

COLLINS, L.J., concurred.

Also reported in 64 J. P. 164.

November 15, 1901.

FIELD *v.* LONGDEN AND SONS.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 571.

Arbitration—Question—Jurisdiction.—SEC. 1, 3.

Where a claim for compensation is admitted and satisfied, no question arises upon which to found jurisdiction in arbitration.

THIS was an appeal by the respondents in the County Court from the award of the Judge at Sheffield.

The applicant was a workman who was injured by accident arising out of and in the course of his employment by the respondents.

The accident occurred on October 20, 1900. The average earnings of the applicant before the accident were 30*s.* a week. After the expiration of two weeks from the date of the accident, total incapacity for work having resulted from the accident, the respondents regularly made a weekly payment of 15*s.* to the applicant.

At the hearing before the County Court Judge the respondents submitted that no "question" had arisen, or that, if such a question had arisen, it had been settled by agreement, and that, therefore, there was no jurisdiction to arbitrate.

The Judge decided that he had jurisdiction, and made an award.

Manisty, K.C., and *H. W. W. Wilberforce* for the appellants.

Danckwerts, K.C., and *A. Sims* for the respondent.

COLLINS, M.R.: I am of opinion that this appeal must be allowed. The question on this appeal arises thus: The workman sustained injury by accident arising out of and in the course of his employment by the appellants. The appellants, after the expiration of two weeks, at once began to pay to him the maximum weekly allowance which

he could get under the statute—that is, one half of his average weekly earnings, and these payments were regularly continued for a long time. A notice of claim for compensation was then given by the workman, and a correspondence on the matter went on for some time between his solicitor and the appellants. Then a request for arbitration was filed. The appellants put in their formal answer, and the matter came before the Judge. The point was then taken by the appellants that in point of fact there was no question in dispute between the parties, and that therefore there was no jurisdiction to hear the case. That point arises under sec. 1 (3) of the Act. It seems to me that, upon the true construction of that section, there must first of all be a "question" between the parties, and that then there is another condition, which may or may not oust the jurisdiction—namely, that the question is not settled by agreement. In order to let in proceedings by arbitration, there must be a "question" between the parties, and then, if that question is not settled by agreement, there may be an arbitration. If there is no question between the parties, an agreement is not necessary. It seems to me that no "question" did arise between the parties in the present case, because the workman was at once paid the full amount of compensation which he could get under the Act, and there was no dispute as to his right to compensation. No question or dispute arose, and under those circumstances an agreement was not required. In my opinion, however, there clearly was an agreement between the parties; but that point does not really arise for discussion in this case, because no question in respect of which an agreement could be necessary had arisen. Notice of a claim for compensation under the Act was given by the workman on April 10, 1901. A long correspondence then followed, which, in my opinion, shows clearly that there was no dispute, and that there was an agreement to pay full compensation. Now, there are provisions in the Act whereby a workman, who is not content to rest upon the fact that there is no dispute between him and his employer, but desires

to have an authorized judicial memorandum, can get such a memorandum. Those provisions are contained in para. 8 of the 2nd schedule, the terms of which are rather important in view of the intention of the Act to give compensation with as little expense to the parties as may be. Let us consider what was the condition of things between the workman and the employers while this practice of paying a weekly allowance as compensation was going on, there being no question between the parties; and, as I will assume, no binding agreement between them. The employers might have said that they proposed to send a memorandum to the workman for his approval; the workman might have said "No," because there was no agreement between them, and then a "question" would have arisen. In fact, there was not in this case any dispute as to there being a binding agreement. If there was an agreement and a memorandum, the memorandum could be filed in the County Court without payment of any fee. Were, then, the proceedings for arbitration in this case justified? Clearly not. They were quite unnecessary. On the legal aspect of the case there was no "question" between the parties at the time of the request for arbitration. The mere giving of a notice of a claim for compensation did not raise a "question" between the parties. The "question" to be settled by arbitration must be a question "as to the liability to pay compensation, or as to the amount or duration of compensation." Therefore, in my opinion, there was no "question" at all in this case within the meaning of sec. 1 (3) of the Act. Alternatively, it was said on behalf of the appellants that there was an agreement, and that therefore the jurisdiction to entertain proceedings for arbitration was ousted. Upon a consideration of the correspondence I come to the conclusion that there was an agreement, though it is unnecessary to decide that question for the purpose of our decision of this appeal. It is not necessary to decide that point, and I do not decide the case upon that ground, but upon the ground that a "question" between the parties within the meaning of sec. 1 (3) of the Act is a condition

precedent to jurisdiction to entertain proceedings for arbitration. In my opinion, therefore, the decision of the learned County Court Judge was wrong, and this appeal must be allowed.

STIRLING and MATHEW, L.JJ., agreed.

Appeal allowed.

Solicitors for the appellants, *Steadman & Van Praagh,* for *Arthur Neal,* Sheffield; for the respondent, *Halses, Trustram, & Co.,* for *A. Muir Wilson,* Sheffield.

Also reported (1902) 1 K. B. 47; 71 L. J. K. B. 120; 85 L. T. 571; 50 W. R. 212; 66 J. P. 291.

November 15, 1901.

JONES *v.* GREAT CENTRAL RAILWAY COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Implied Agreement—Refusal to Register—Question—Costs.—SEC. 1, 3; SCHED. II. 8.

An agreement settling a question under the Act may be implied.

A memorandum of an implied agreement may be registered.

The fact that a request for arbitration has been filed is no ground for refusing to register a memorandum of agreement.

Where an effective agreement between the parties subsists, a question does not arise within the meaning of sec. 1, 3, upon one party making a capricious claim against the other.

To found jurisdiction in arbitration, a question must have arisen before the request for arbitration.

There is no jurisdiction to make a successful respondent pay the costs of the applicant.

THIS was an appeal by the respondents in the County Court from the decision of the Judge, making an award in favour of the applicant, with costs.

The facts of the case and the award appear (1901) 3 W. C. C. 50.

Minton-Senhouse, for the appellants: There is no reason why an agreement may not be implied. In *Bradbury* v. *Bedworth Coal and Iron Company* ([1900] 2 W. C. C. 138) an agreement to terminate weekly payments was implied. A memorandum of an implied agreement can be drawn without difficulty. On the receipt of the memorandum in this case it was the duty of the registrar to record it unless he was not satisfied as to its genuineness (Sched. II. 8). If he was not so satisfied, his proper course would have been to have communicated with the applicant (rule 41), but he ought not to have refused merely on the ground that a request for arbitration had been filed. The claim put forward for payment of a lump sum was not genuine. If it had been acceded to, the payment would not have been of compensation under the Act, because that compensation must take the form of weekly payments. Making a claim of that sort does not give rise to a "question" between the parties. Here there was no "question" in dispute when the request for arbitration was filed, and there was therefore no jurisdiction. The respondents succeeded in every point in the arbitration, and they ought to have been allowed their costs.

Danckwerts, K.C., and *Sims* for the respondents: There never was an agreement between these parties. The appellants drafted an agreement which my client refused to sign. That being so, he had a right to obtain an award. Even if there had not been a question before, the request for arbitration, with the accompanying particulars, raised questions which were in dispute until the award was made. The applicant having a right to an award of the County Court Judge, the appellants were wrong in opposing him, and the Judge had jurisdiction to order them to pay the costs of the arbitration.

COLLINS, M.R.: I think this appeal must be allowed, and on the same grounds as the last appeal (*Field* v. *Longden & Sons*, *ante*, p. 20). The facts are shortly stated by the learned County Court Judge. "The accident happened on January 25. The applicant's average weekly earnings before the

accident were 19*s.* 10*d.* On February 11 the applicant's father wrote on his behalf claiming compensation under the Act. The respondents had never disputed their liability to pay full compensation, and, in fact, had paid the same from fourteen days after the accident, and are still paying it. On February 23, 1901, the applicant received all arrears of weekly payments, but refused to sign a memorandum of agreement that was given to him, stating he wanted a lump sum. The applicant's solicitor, on May 7, wrote: 'I shall be glad to hear whether you are prepared to make any offer of settlement of the matter. Please treat this letter as notice of my client's accident and claim.' To this the appellants replied, on May 16, 1901, that they were paying the full weekly allowance, and that these payments would continue during disability. The request for arbitration was filed on May 17." Now, that was the condition of affairs at the time that these proceedings were taken, and what does that amount to? It seems to me to amount to this, that there was no dispute whatever between the parties, and no question had arisen as to their liability to pay compensation or as to the amount or duration of the compensation. The Judge has found as a fact that the appellants had never disputed their liability to pay full compensation, and that embraces liability, duration, and full compensation. What the matter went off upon—and such dispute as did arise—was this, that while the applicant did not dispute the fact that they admitted his claim for compensation, he said: "On the basis of your admitted liability to pay me full compensation under the Act, which means week to week compensation, I desire that you should pay me a lump sum." The Court had no jurisdiction whatever to entertain any question as to a lump sum. There was no question at all between the parties, and we held in the last case (*Field* v. *Longden & Sons, ante*, p. 20), that there must be a question before you can start proceedings, and it seems to me it is too late, in order to give jurisdiction, to raise, by the terms of your notice, a discussion as to something that was never disputed before. I will

now deal with what happened subsequently. In the request for arbitration the applicant set up that he had been receiving 9*s.* 11*d.*, and said he was entitled to 10*s.* That question had never been raised before, and the appellants, by their answer, say that they are paying him half his full wages, and that was found to be the fact by the Judge. The learned Judge does not, in the reasons for his award, which I have just read ([1901] 3 W. C. C. 50), refer at all to the point which has been made by Mr. Danckwerts, that on the claim and the answer taken together there appears to have been a dispute. If there was a dispute arising, then it arose after a time at which it was necessary it should have arisen, and when it was examined into it turned out that there was nothing in it at all. In those circumstances the respondents asked him to sign a memorandum, which would have given him all that was wanted, and he refused. Then the respondents took steps to get the Registrar to record it. That was after the compensation proceedings were instituted, and the Registrar refused, on the ground that the compensation proceedings had begun. That is not a good ground for refusal. The learned Judge has not only awarded compensation, but with costs. To award compensation with costs in those circumstances—costs to be paid by persons who had succeeded in establishing an answer to the case on the only question that was to be determined—to make the successful respondent pay the costs of the unsuccessful applicant seems entirely outside the jurisdiction of the Court. On that ground also, I think this appeal ought to be allowed. I prefer to rest my judgment on the first ground, because I think it is in accordance with our decision in the last case (*Field* v. *Longden & Sons, ante*, p. 20), and cuts away the jurisdiction altogether. I am of opinion that this appeal ought to be allowed.

STIRLING, L.J.: I am in substance of the same opinion. I confess I entertain a little doubt as to one point, namely, whether a question was not raised by the request for arbitration. It was a dispute of a very trifling character,

whether the wages of the workman were £1 a week or 19*s.* 10*d.* a week. But supposing that "question" was then raised, it was a question which was decided by the Judge in favour of the respondents, and the whole matter in dispute therefore was decided in their favour. Now, I understand it to be settled that, where the defendant succeeds there is no jurisdiction to make the defendant pay the costs of the unsuccessful plaintiff: *Foster* v. *Great Western Railway Company* (8 Q. B. D. 515) and *Dicks* v. *Yates* (18 C. D. 76). In both those cases it was held that although there is in general no appeal on the subject of costs from the discretion of the Judge, yet an order of that kind is an appealable order. In this present case it appears to me that the order of the Judge directing the respondents to pay the applicant's costs is erroneous, and I therefore think that the appeal ought to be allowed, with costs.

MATHEW, L.J.: The question raised in this case seems to me to be one of very great importance, because it comes to this, whether an employer, perfectly willing to yield to the law and to give the workman all that he is entitled to, can escape the penalty of litigation. In this case it is clear that the employer was willing to do everything that the law obliged him to do. That was intimated to the workman, and he accepted, and acceded to that position, but sought to displace the law by raising a capricious claim to be paid a lump sum instead of what the law gave him. Mr. Danckwerts has argued that a capricious claim of that sort is quite enough to show that there was a dispute within the meaning of sec. 1, sub-sec. 3. I am of opinion that what had been done by the employer precluded there being any real dispute as to the obligation. It is, moreover, said that there is another ground of appeal. A claim, for which it appears there was no foundation, was put forward after the proceedings had commenced—a claim that the wages were £1 a week instead of 19*s.* 10*d.* Upon that the Judge has found that 19*s.* 10*d.* was the proper amount. In these circumstances, I think it would be an extraordinary abuse of procedure to permit any costs

to be thrown upon the employer. I agree, therefore, that the appeal must be allowed.

Solicitors for the appellants, *Cunliffes & Davenport*, for *Davies*, Manchester; for the respondent, *Halses, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

An order was made referring the award to the County Court Judge to entertain an application on behalf of the appellants to have a memorandum of agreement recorded with the opinion of the Court thereon that a memorandum of implied agreement may be recorded.

Not elsewhere reported.

November 25, 1901.

CATTERMOLE *v.* ATLANTIC TRANSPORT COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 513.

Costs—Assessment of Compensation.—SEC. 1, 4.

Where the Court assesses compensation under sec. 1, 4, there is jurisdiction to deal with the costs of the proceedings for assessment as well as with the costs of the action.

If no costs have been caused by bringing the action instead of an arbitration, the Court has power to order the defendant to pay all the costs of the proceedings.

Skeggs v. *Keen* ([1899] 1 W. C. C. 35) considered.

Flowers v. *Chambers* ([1899] 1 W. C. C. 51) not followed.

THIS was an appeal by the defendants from a decision of the Judge of the Bow County Court awarding compensation.

The plaintiff was the widow of a workman who was killed by an accident. The deceased's widow brought an action under the Employers' Liability Act, 1880.

The Judge held that the defendants were not liable in this action, but that they would have been liable to pay compensation under the Workmen's Compensation Act. He accordingly dismissed the action, and then at the request of the

plaintiff proceeded to assess such compensation. He also directed the defendants to pay the plaintiff the costs "of and incidental to these proceedings."

The defendants appealed.

Burleigh Kilburn, for the defendants, cited *Woodham* v. *Atlantic Transport Company* ([1899] 1 W. C. C. 52), *Hennessey* v. *M'Cabe* ([1900] 2 W. C. C. 80), *Spencer v. Livett* ([1900] 2 W. C. C. 112), *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51), *Raine* v. *Jobson* ([1901] 3 W. C. C. 135), *Edwards* v. *Godfrey* ([1899] 1 W. C. C. 32), *Skeggs* v. *Keen* ([1899] 1 W. C. C. 35).

W. B. Yates for the plaintiff.

November 25.—STIRLING, L.J., read the following judgment: This is an appeal from an award made under sec. 1, sub-sec. 4, of the Act. The Judge determined that the injury was one for which the defendants were not liable in the action, but that the defendants would have been liable to pay compensation under the Workmen's Compensation Act; and thereupon, at the request of the plaintiff, he assessed compensation at the sum of £234, and ordered the defendants to pay the plaintiff's costs of and incident to the proceedings. Two points were raised on the appeal. First, that the workman was not employed on, in, or about a factory; secondly, that the Judge had no power to give the plaintiff any costs of the proceedings. As to the first point, the question is whether we ought to follow the decision of this Court in *Flowers* v. *Chambers* (*sup.*) or that of the House of Lords in *Raine* v. *Jobson* (*sup.*). In my opinion the decision of the learned Judge on this point cannot be disturbed. The second point raises a question which was left undecided by this Court in *Skeggs* v. *Keen* (*sup.*)—viz. whether the Judge had power to give the unsuccessful plaintiff any costs upon the assessment of compensation under sec. 1, sub-sec. 4, of the Act. The effect of sec. 1, sub-sec. 2 (*b*), is to compel the workman to elect whether he will claim compensation under the Act or take such proceedings as were open to him before the Act. If he adopts the latter course he cannot make any

claim under the Act except by virtue of sec. 1, sub-sec. 4: See *Edwards* v. *Godfrey* (*sup.*). The sub-section directs that the compensation awarded and the directions as to deduction of costs are to be embodied in a certificate which is to have the force and effect of an award under the Act, but says nothing further as to the costs; and it is contended that the power of the judge to deal with compensation is entirely derived from this section, and cannot extend beyond what is thereby expressly conferred. In *Skeggs* v. *Keen* (*sup.*), Rigby, L.J., stated that the inclination of his opinion was to that effect, but neither he nor any of the members of the Court gave a decision on the point. If this contention be well founded, the result will be that the workman not only will be liable to have all costs caused by his bringing the action instead of proceeding under the Act deducted from the compensation, but will have to bear all his own costs, although successful in recovering compensation; whereas, according to the ordinary practice as regards costs, he ought to have the costs of successful proceedings except in so far as such are increased by any part of those proceedings which fails, and ought to bear all costs occasioned by such failure. It is true that in Sched. 2, para. 6, express provision is made for the costs of proceedings by arbitration under the Act; but here the Legislature is dealing with proceedings in, and consequent on, an action over the costs of which the Court which tries the action would have full control by the exercise of its ordinary jurisdiction. It will be observed that sec. 1, sub-sec. 4, treats such an action as one in which it may be determined both that the employer is not liable for damages, and also that he would have been liable to pay compensation under the provisions of the Act; evidence as to the liability under the Act may therefore be adduced in the action. The sub-section does not, indeed, refer to the assessment of compensation as being made in the action, but such assessment certainly arises out of, and is consequent upon, it; and it would be a refined distinction to hold that, while the determination of the liability to pay compensation is a proceeding

in the action, the assessment of the amount is not. In my judgment the effect of the sub-section is to leave the Court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act. Such costs, it may be observed, do not necessarily include all the costs of the action. In general the Court to try such actions is a County Court. By sec. 113 of the County Courts Act, 1888, all the costs of any action or matter in a County Court, not otherwise provided for by the Act, are to be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction are to abide the event. By sec. 186 "action . . . shall mean every proceeding in the Court which may be commenced as prescribed by plaint"; and "matter shall mean every proceeding in the Court which may be commenced as prescribed otherwise than by plaint"; and "prescribed shall mean prescribed by the County Court rules for the time being." By Sched. 2, para. 10, of the Workmen's Compensation Act, 1897, the duty of a County Court Judge under this Act is, subject to Rules of Court, to be part of the duties of the County Court. I think that under these enactments the County Court Judge has power to deal with the costs of the action, including the proceedings for the assessment of compensation under sec. 1, sub-sec. 4. If the Court in which the action is tried be the High Court (as may be the case either where the action is originally brought in the High Court or where, being originally brought in the County Court, it is transferred to the High Court—see sec. 6 of the Employers' Liability Act, 1880) the High Court has full power to deal with costs under sec. 5 of the Judicature Act, 1890. The learned Judge has dismissed the action, but has ordered the defendants to pay all the costs of the proceedings, and has not ordered any costs to be deducted from the compensation. In general this would not be right; but such an order may

be justified by special circumstances, as if (for example) the Judge were satisfied that no costs had been caused by the plaintiff bringing an action instead of proceeding under the Act. This matter is one within the discretion of the Judge; it has not been shown that the Judge exercised his discretion on a wrong principle; and in the result the appeal fails, and must be dismissed with costs.

COLLINS, M.R., and MATHEW, L.J., agreed.

Appeal dismissed.

Solicitor for the plaintiff, *R. H. Ward;* for the defendants, *Holman, Birdwood, & Co.*

Also reported in (1902) 1 K. B. 204; 71 L. J. K. B. 173; 85 L. T. 513; 50 W. R. 129; 66 J. P. 4.

November 10, 1901.

LEE *v.* CORTONWOOD COLLIERIES COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

The Times, November 11, 1901.

Claim—Payment of Compensation—Notice of Injury.—SEC. 2, 1.

Semble, notice of injury, payment of compensation, and a request for arbitration do not amount to a claim.

THIS was an appeal from a decision of the Judge of the Rotherham County Court.

The applicant was injured by an accident on March 15, 1900. He gave notice of injury. The employers continued to pay him the sum of 11*s.* 6*d.* from March 29 till January 24, 1901. A correspondence began with reference to his being examined by a medical man. On January 23 the employers wrote that, in consequence of their having received a report to the effect that he had recovered from his injuries, no further compensation would be paid to him "after that due to-morrow, the 24th inst." On February 20 the applicant filed a request for

arbitration, but no formal claim for compensation had been made.

The County Court Judge dismissed the application, on the ground that no claim had been made as required by the Act.

The applicant appealed, and it was argued on his behalf that there was clear evidence on the facts that a claim had been made and admitted, and that a formal claim had been waived. It was further argued on his behalf that the employers were estopped from setting up the point that no claim had been made, and reference was made to the cases of *Wright* v. *Bagnall* ([1900] 2 W. C. C. 36) and *Rendall* v. *Hill's Dry Docks Company* ([1900] 2 W. C. C. 40).

Danckwerts, K.C., and *Sims* for the applicant; *Ruegg*, K.C., and *McIntyre* for the employers.

The COURT directed that the case should be sent back to the County Court Judge.

The MASTER OF THE ROLLS said that the evidence, as it had been stated before the Court, seemed to be in favour of the view that there was an estoppel. The case had better go back to the County Court Judge for a more definite ascertainment of the facts.

The LORDS JUSTICES concurred.

November 14, 1901.

BUSH *v.* HAWES.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 507.

Work ancillary to Trade of Undertaker.—SEC. 4.

Whether work is part of the trade of an undertaker depends upon whether it is part of the trade carried on by him, and not upon whether it is part of the trade carried on by persons engaged in a similar trade.

Knight v. *Cubitt* (*post*, p. 42) distinguished.

THIS was an appeal by the applicant and a cross-appeal by

the respondent from a decision of the Judge of the Norwich County Court.

The applicant was the widow of a workman who died of an injury received by him in the course of his employment while engaged in putting an iron roof on to a new building constructed by the respondent.

The respondent was a builder by trade, and had contracted with a building owner to erect a fish-curing factory at Lowestoft. As a part of this contract he was to erect a boiler-house in connection with which was a chimney shaft, and the boiler-house was to have an iron roof. It appeared from the evidence that the respondent did not make a practice of contracting to put iron roofs on buildings erected by him, and the contract made with the building owner in the present case was exceptional in this respect. He sub-contracted with a man named Hadley, who agreed to put up the iron roof, and the deceased workman was in the service of Hadley, and employed in putting the roof on, when he received the injuries which caused his death.

The claim of the widow was made under sec. 4.

The respondent's first contention was that the building being constructed did not exceed 30 feet in height, and the Judge so decided.

The respondent's second contention was that the putting on of the iron roof was merely ancillary or incidental to, and was no part of or process in, the business carried on by him within the proviso to sec. 4.

The Judge found as a fact that the putting on of iron roofs was no part of the business which the respondent carried on; but he further decided that as in modern times iron work enters largely into the construction of buildings, the putting of iron roofs on to buildings is a part of what is ordinarily understood to be a builder's trade. He therefore decided on this point against the respondent.

The applicant appealed, and the respondent entered a cross-appeal.

W. M. Thompson, for the applicant, referred to *Knight v. Cubitt* (not then reported) (*sup.*).

F. Low for the respondent.

COLLINS, M.R.: I think that the respondent's cross-appeal must be allowed. The applicant is a workman who was accidentally injured in the course of his employment while engaged in putting an iron roof on to a building which was in course of erection by the respondent. The respondent was a builder who had contracted to put up this building, but had sub-contracted with another man for the putting up of the iron roof. The applicant was in the service, not of the respondent, but of the sub-contractor. Now, for the purposes of this cross-appeal, I will assume that the building which was being constructed was over 30 feet in height. The applicant's claim against the respondent, who was the "undertaker" for the construction of the building, depends upon sec. 4. But to that section is a proviso that "this section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively." The respondent contends that this proviso is applicable to his contract with the sub-contractor for the putting up of the iron roof. What is the standard by which such a question is to be determined? In my opinion the question is whether the work to be done was a part of or process in the business which is in fact carried on by the undertaker. If the work is not that, the undertaker is not liable to an injured workman under sec. 4. Whether the putting up of this iron roof was merely ancillary or incidental to and no part of or process in the respondent's trade is a question of fact. The County Court Judge has found as a fact that it was no part of the trade carried on by the respondent, but then he afterwards seems to have taken as the standard by which the applicability of the proviso was to be decided the question whether putting up iron roofs on buildings was a common thing in the building

trade, not whether it was a thing which the respondent was accustomed to do in the course of his business. The respondent gave evidence that in his business he was not in the habit of undertaking the construction of iron roofs, and the learned County Court Judge has come to a finding of fact in accordance with that evidence. The recent case of *Knight* v. *Cubitt* (*sup.*) was pressed upon us. In that case the respondents were builders who had undertaken to demolish a house and rebuild it. They did not do the demolition themselves, but contracted with a housebreaker to do it for them. The claim for compensation was made by the widow of a workman in the employ of the housebreaker, who was accidentally killed while engaged in demolishing the house. We affirmed the decision of the County Court Judge, who had held that the work of demolishing the house was not ancillary to the business of the respondents. But there it appeared that, though the respondents never did the work of demolishing houses themselves, they habitually made it part of their business to undertake contracts involving the demolition of buildings. As it was part of the business carried on by them to make contracts for demolishing houses, the demolition in that case was a part of their business, and not merely ancillary to it. Here the finding of fact by the County Court Judge is that it is not a part of the business carried on by the respondent to construct iron roofs on buildings. On that finding, the case comes within the proviso to sec. 4, and the respondent is not liable to pay compensation to the applicant. The respondent's cross-appeal must therefore be allowed.

STIRLING and MATHEW, L.JJ., concurred.

Cross-appeal allowed.

Solicitors for the applicant, *Pattinson & Brewer;* for the respondent, *Crowders, Vizard, & Oldham,* for *Mills & Reeve,* Norwich.

Also reported in (1902) 1 K. B. 216; 71 L. J. K. B. 68; 85 L. T. 507; 50 W. R. 311; 66 J. P. 260.

April 9, 1902.

KNIVETON *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ

86 *L. T.* 721.

Appeal.—SEC. 5; SCHED. II. 4.

An appeal from an order under sec. 5 lies to the Divisional Court, and not to the Court of Appeal.

THIS was an appeal from an order under sec. 5 of the Act made by the Judge of the Bolton County Court.

Chester Jones, for the present respondents, raised as a preliminary objection the question whether an appeal from such an order lies to the Divisional Court.

Haldane, K.C., (*F. E. Smith* with him) for the appellants.

Lord ALVERSTONE, C.J.: The case of *Leech* v. *Life and Health Insurance Association* ([1901] 3 W. C. C. 202) shows that no appeal lies to the Court of Appeal in respect of a matter such as this arising under sec. 5, 1, of the Act. It seems to me that sec. 5 is merely a statutory subrogation of the workman to the rights of the employer, and in respect of that matter—it being a matter before the County Court Judge, and an order having been made by him in that matter —it seems to me that the case comes within sec. 120 of the County Courts Act, and that the appeal does lie to this Court under that section.

DARLING and CHANNELL, JJ., concurred.

Objection overruled, and the appeal heard on the merits and allowed. Leave to appeal.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.,* for *Peace & Ellis,* Wigan; for the respondents, *Chester & Co.,* for *Fielding & Fernihough,* Bolton.

Also reported in (1902) 1 K. B. 880; 71 L. J. K. B. 588; 86 L. T. 721; 50 W. R. 704.

This case was affirmed in *Morris* v. *Northern Employers' Mutual Indemnity Company* (*post,* p. 38).

May 30, 31, 1902.

MORRIS *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY.

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 748.

Appeal.—SEC. 5; SCHED. II. 4.

An appeal from an order under sec. 5 lies to the Divisional Court, and not to the Court of Appeal.

THIS was an appeal by the plaintiff from an order of the Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) setting aside the order of the County Court Judge. It raised the same point that was decided in *Kniveton* v. *Northern Employers' Mutual Indemnity Company* (*ante*, p. 37).

Ruegg, K.C., and *Chester Jones* for the workman; *Haldane*, K.C., and *F. E. Smith*, for the company, were not called upon.

COLLINS, M.R.: This is an appeal from the judgment of the Divisional Court upon a question arising under sec. 5. The workman made an application to the County Court Judge under that section. The Judge made an order in his favour. The insurance company gave notice of appeal to this Court; but we had held, in *Leech* v. *Life and Health Assurance Association* ([1901] 3 W. C. C. 202), that there was no right of appeal to the Court of Appeal from an order made under the above section. The insurance company accordingly appealed to the King's Bench Division. The objection was then taken that an appeal would not lie to that Court. Had the Divisional Court any jurisdiction to entertain the appeal? The County Court Judge, acting in a matter within his jurisdiction, had made an order, and therefore the case comes directly within the words of sec. 120 of the County Courts Act, 1888, which provides that, "if any party in any action or matter shall be dissatisfied with the determination

or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the Judge may appeal to the High Court." "Matter" is a general term which has been used by the Legislature to include everything besides an action which comes within the jurisdiction of a County Court Judge. In my opinion, therefore, the Divisional Court had jurisdiction to entertain the appeal, and were right in so holding.

MATHEW and COZENS-HARDY, L.JJ., agreed.

Appeal dismissed.

Solicitors for the appellant, *Chester, Broome, & Griffithes*, for *Fielding & Fernihough*, Bolton; for the respondents, *Rowcliffes, Rawle, & Co.*, for *Peace & Ellis*, Wigan.

Also reported in (1902) 2 K. B. 165; 71 L. J. K. B. 773; 86 L. T. 748; 50 W. R. 545.

August 7, 1902.

GREAT NORTHERN RAILWAY COMPANY *v.* WHITEHEAD & CO.

Before DARLING, J.

18 *T. L. R.* 816.

Indemnity—Costs.—SEC. 6.

Where an employer is entitled to be indemnified under sec. 6, the indemnity includes the costs of the proceedings in arbitration.

THIS was an action to recover the amount of an indemnity which the plaintiffs claimed under sec. 6.

The plaintiffs had had an award made against them for £78 11*s.* 3*d.*, and now alleged that the injury had been caused by the negligence of the defendants.

Montague Lush, K.C., and *Roskill* for the plaintiffs; *Dickens*, K.C., and *Bower* for the defendants.

Judgment having been given in the plaintiffs' favour for the amount of the award, it was contended on behalf of the plaintiffs that they were entitled to the costs they had been put to as a consequence of the compensation proceedings.

It was contended on behalf of the defendants that the claim for compensation under the Act of 1897 had nothing to do with negligence at all. The workman was entitled to compensation from his employer whether the defendants were negligent or not. The section carefully said nothing as to indemnification with regard to costs, and it was submitted that the Court had no jurisdiction to deal with them.

DARLING, J., said that, having regard to the words of the section, he thought the costs were recoverable. He did not think the employer would be indemnified unless he received the compensation he had had to pay and the costs he had been put to. He therefore gave judgment for the plaintiffs for £78 11*s.* 3*d.*, and £10 17*s.* 2*d.*, the amount of the taxed costs which the plaintiffs had paid.

Solicitors: *R. H. Dawe*, for the plaintiffs; *Wynne-Baxter & Keeble*, for the defendants.

April 29, 1902.

TONG *v.* GREAT NORTHERN RAILWAY COMPANY.

Before WRIGHT, J.

86 *L. T.* 802.

Action after Payment of Compensation.—SEC. 6.

An action in respect of the same injury will not lie against a stranger when compensation has been recovered against the employer.

THIS was an action in respect of personal injuries caused by the negligence of the defendants.

The plaintiff claimed damages, £1000, which included medical expenses and damages for pain and suffering.

Before commencing the action he had obtained an award for compensation under the Workmen's Compensation Act, 1897, against his employer.

It was contended on behalf of the plaintiff that although an action could not be maintained for loss of wages, yet a claim could be brought against the third person for damages for pain and suffering and expenses incurred owing to such third person's negligence.

Tindal Atkinson, K.C., (*M. Lush,* K.C., with him) for the defendants.

Longstaffe for the plaintiff.

WRIGHT, J.: I shall require more assistance before I can give any other meaning to the section than it seems to me *primâ facie* to express. Sec. 6 says that where there is a claim for compensation under the Act, and the circumstances are such as to create (now come words of the widest kind) "a legal liability in some person other than the employer to pay damages in respect thereof," the workman may proceed against either such person or his employer, but not against both. Certainly here, if the plaintiff is right in suggesting that there was negligence on the part of the defendants causing the accident, that circumstance did create a legal liability in the defendants, apart from the employer, to pay damages in respect thereof. Therefore the case appears to be within the words of that part of the section used in their natural sense, and I see nothing to suggest any other meaning. Now, what is the consequence of that? The section provides that the workman may in such a case, at his option, proceed against that party to recover the ordinary damages the law allows, or he may proceed against his employer for compensation under this Act. It is quite clear that if he proceeded under this Act he would not get anything for some parts of his cause of action for which he could get something if he proceeded against these defendants. The words of the Act are "at his option proceed either at law against that person to recover damages or against his employer for compensation under this Act, but not against both, and

if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person." It is quite clear that this Act does not appear to contemplate, in ordinary cases, compensation for anything but the loss of wages, but there is no hardship in holding a man to the option which this section gives him. If he is likely to get more under the ordinary law than he would get under this Act he will not claim under the Act; and if, on the other hand, he prefers to take his chance under the Act instead of going under the ordinary law, I see no reason why he should not be held to his option.

Judgment for the defendants.

Solicitors: *Scott, Lawson & Palmer*, for *Arthur Willey*, Leeds; *R. Hill Dawe.*

Also reported in 18 T. L. R. 566.

November 7, 1901.

KNIGHT *v.* CUBITT & CO.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 526.

Building—Party-wall—Work merely ancillary to Business of Builder —Undertaking.—SECS. 4 and 7.

A building had been demolished to within a few feet of the ground, leaving a party-wall exceeding 30 feet in height.

Held, that there was evidence that the building then exceeded 30 feet in height.

Builders entered into a contract, in the usual course of their business, to pull down and rebuild a house. It was their invariable custom to contract with housebreakers for the demolition; they never had anything to do with the premises until ready for building operations.

Held, that there was evidence that demolition was part of, and not merely ancillary or incidental to, their business.

The expression "the person undertaking" in sec. 7, 2, includes a person

who, in the usual course of his business, enters into a contract to execute the work, and sub-contracts for the execution of it, and who, in fact, takes no part in the execution of it.

THIS was an appeal by the respondents in the County Court at Brompton.

The appellants, who carried on a very large business as builders, entered into an agreement, whereby they agreed to demolish and reconstruct two adjoining houses. In accordance with their invariable practice, the appellants did not execute the work of demolition themselves, but employed a sub-contractor to do it.

The deceased workman was employed by the sub-contractor. Before the work of demolition commenced the height of both the houses exceeded 30 feet. At the time of the accident the part of the building upon which the deceased workman was working was reduced to the height of about 11 feet above the street, but the party-wall between the two houses was intact.

Evidence was given on behalf of the appellants by one of the partners that they never did pull down houses; that it was usual to have a pulling-down clause in their contracts for reconstruction or alteration, and that when he entered into this contract it was the intention to pull down the house and rebuild; and that they contracted with a sub-contractor to pull down this house. Further evidence was also given that they never did pull down a building themselves, and that the business of builders was distinct from that of housebreakers.

The County Court Judge held that the appellants were undertakers, and were liable under sec. 4, and that the building exceeded 30 feet in height.

Ruegg, K.C., and *Minton-Senhouse*, for the appellants: The definition of "undertakers" in sec. 7, 2, is, in the case of a building, "the persons undertaking the construction, repair, or demolition," and that means the persons who actually carry out and execute the work, and not persons who only contract to have the work done: *Re Stewart* (60

L. T. 737; 41 Ch. Div. 494, 504), *Re Allen* (56 L. T. 6; 34 Ch. Div. 433). This work of demolishing houses was "merely ancillary or incidental to, and no part of, or process in, the trade or business carried on" by them. Their business was that of builders, and they never themselves carried out any work of demolition; they made contracts to demolish buildings merely as incidental to contracts to alter or rebuild: *Pearce* v. *London and South-Western Railway Company* ([1900] 2 W. C. C. 47), *Wrigley* v. *Bagley & Wright* ([1901] 3 W. C. C. 61). This building, at the time of the accident, had been pulled down so as to be less than 30 feet in height. The fact that the party-wall was standing does not make any difference, for it was not part of this building which was being demolished: *Billings* v. *Holloway* ([1899] 1 W. C. C. 59), *Mellor* v. *Tomkinson* ([1899) 1 W. C. C. 57), *Rixsom* v. *Pritchard & Renwick* ([1900] 2 W. C. C. 65).

Edmond Browne, for the respondent, was not called upon.

COLLINS, M.R.: I am of opinion that this appeal must be dismissed. Three points have been raised by the appellants. The first point was that the term "undertakers" in the Act must be so construed as not to include the appellants; the second, that the work was being done by a sub-contractor, and was work which was "merely ancillary or incidental to, and no part of, or process in, the trade or business carried on by" the appellants; and the third, and most important, that the building upon which the workman was employed did not exceed 30 feet in height at the time of the accident. I will take the last point first. We have in this case the finding of the County Court Judge that this building was a building exceeding 30 feet in height at the time of the accident. Now, we cannot in this Court impugn anything that was laid down in *Billings* v. *Holloway* (*sup.*). This case, however, is entirely independent of anything that was decided in that case, and we have only to see whether there was any evidence to justify the finding of the County Court Judge that this building exceeded 30 feet in height. The contention of the appellants must be that there was no evidence

upon which the County Court Judge could properly find that the building exceeded 30 feet in height. The deceased man was employed upon a building which was being demolished. An essential part of that building—that is, the party-wall—was still standing, and was more than 30 feet in height. I am not prepared, therefore, to say that there was no evidence upon which the learned County Court Judge could properly find that the workman was employed upon a building which was more than 30 feet in height at the time when the accident happened. That objection, therefore, cannot prevail. So much for that point. Then as to the question whether the appellants were "undertakers" within the meaning of the Act. It is first said that the appellants were not undertakers because they did not themselves deal directly with the work of demolition. The answer to that contention is that, according to the evidence, it was a regular part of their business to contract for the demolition of buildings, although it may be that they did not actually do the work themselves, for the purpose of constructing or altering a building. I do not see how there could possibly be better evidence that the appellants were undertakers in respect of this work. Therefore, it seems to me that they were in fact undertakers. I construe the term "undertakers" in this Act by reference to the Act itself, and I do not care what it may be in other Acts. There is nothing in this case to exclude the defendants from being undertakers. This particular question arises under sec. 4 of the Act, which deals with the question of undertakers, and treats as an undertaker the very person who, *ex hypothesi*, has contracted with another person to do the work. Therefore sec. 4 embraces a person who is actually doing by others the work which he has contracted to do. This case therefore falls clearly within sec. 4, and is not within the exception at the end of the section. The appeal therefore fails upon all points, and must be dismissed.

STIRLING, L.J.: I am of the same opinion. The question whether the appellants were undertakers within the meaning

of the Act turns upon the provisions of sec. 7, 2, of the Act, which provides that "'Undertakers' . . . in the case of a building means the persons undertaking the construction, repair, or demolition." The appellants entered into a contract for the demolition and reconstruction or alteration of the building in question. It is said that, although they made that contract, they did not undertake the demolition of the building within the meaning of the Act, because from the context it ought to be inferred that by "undertakers" the section means persons who themselves execute the work. It seems to me that sec. 7, 2, ought to be read together with sec. 4. The Act contemplates that persons may be "undertakers," although they do not themselves execute the work or any substantial part of it, but sub-contract with others to do it for them. I think, therefore, that the appellants were undertakers within the meaning of the Act. But then it is said that the appellants are exonerated by reason of the proviso to sec. 4. It is said that the trade or business of the appellants was not that of demolishers of buildings, but was that of builders only, and that the two businesses are separate and distinct. The evidence does show that the appellants employed others to demolish, but the question is whether it was part of the trade or business of the appellants to demolish. What is the evidence upon that question? It is admitted that the contract for the demolition of this building was made by one partner, and that it was a usual kind of contract in the business; it was not suggested that the making of that contract was beyond his authority. From that I infer that it was part of the business or trade of the appellants, and therefore the proviso to sec. 4 does not exonerate them. The third point relates to the question whether the building was more than 30 feet in height when the accident happened, and upon that question I have nothing to add to what the Master of the Rolls has said.

MATHEW, L.J.: I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Leighton & Savory;* for the respondent, *Pattinson & Brewer.*

Also reported (1902) 1 K. B. 31; 71 L. J. K. B. 65; 85 L. T. 526; 50 W. R. 113; 66 J. P. 52; 18 T. L. R. 26.

November 8, 1901.

McGRATH *v.* NEILL & SONS.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 36.

Height of Building—Measurement.—SEC. 7, 1.

What is the height of a building is a question of fact.

Measurement may be taken below the ground level.

Quære whether the footings may be reckoned in measuring the height of a building.

McGrath v. *Neill & Sons* ([1901] 3 W. C. C. 67) affirmed.

THE facts of the case and the learned Judge's decision appear in (1901) 3 W. C. C. 67.

Clavell Salter for the employers

McCleary, for the applicant, was not called upon.

The COURT dismissed the appeal.

The MASTER OF THE ROLLS said that it had been pointed out by this Court in *Billings* v. *Holloway* ([1899] 1 W. C. C. 59) that the height of a building must be ascertained at the time of the accident. Did this building at the time of the accident exceed 30 feet in height? It seemed to him that that must be a question of fact in each case, provided there was evidence to support the finding. He could quite conceive a building which, when measured from its base before the footings were filled in to a particular point, might, in some conditions of fact, be considered as exceeding 30 feet in height, and in other conditions of fact might not. His Lordship agreed with the County Court Judge that the provision as to the height of the building was inserted to differentiate different classes of buildings and builders. As

Lord Macnaghten said in *Hoddinott* v. *Newton, Chambers, & Co.* ([1901] 3 W. C. C. 74, 81), the provisions as to the height of a building and as to the scaffolding "were intended to exempt a certain class of buildings, and perhaps a certain class of builders of the humbler sort, from the operation of the Act." It was obvious that a building might be a building of importance, though the greater part were below the level of the ground or street. All the mischief contemplated by the Act, when it gave a remedy to workmen employed on that class of building, might arise though the greater part was below the level of the ground or street. Therefore the fact that part of a building was below the level of the ground did not prevent it being over 30 feet in height. As he had repeatedly pointed out, this Court could only interfere with the finding of fact of a County Court Judge where there was no evidence to support that finding or the Judge had misdirected himself. From the evidence, as far as he could make out, probably the footings were covered in, but he could see no evidence that there was more than a flooring at the top of the footings. The presumption from the evidence was that the flooring at the time of the accident had not got beyond that stage. In his opinion, therefore, the height of the building must, in this case, be measured from the top of the footings, and, being so measured, the building at the time of the accident exceeded 30 feet in height.

STIRLING, L.J., delivered judgment arriving at the same conclusion, and adding that, as his learned brethren thought that the evidence showed that, at the time of the accident, merely the footings were covered in, he was not prepared to differ from them on that question of fact.

MATHEW, L.J., concurred.

Solicitors for the appellants, *Mackrell & Co.*; for the respondents, *Chester & Co.*, for *Crofton, Craven, & Worthington*, Manchester.

Also reported in (1902) 1 K. B. 211; 71 L. J. K. B. 58; 50 W. R. 162; 66 J. P. 180; 18 T. L. R. 36.

November 23, 1901.

VEAZEY *v.* CHATTLE.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 574.

Scaffolding—Crawling Board.—SEC. 7, 1.

A crawling board, *i.e.* a plank hooked over the ridge of the roof of a house with transverse pieces of wood nailed upon it to give a foothold, may be scaffolding (Stirling, L.J., diss.).

THIS was an appeal by the respondent from the award of the County Court Judge at Derby.

The facts appear from the judgments.

Ruegg, K.C., and *Cranstoun*, for the appellant, cited *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), *Hoddinott* v. *Newton, Chambers, & Co.* ([1901] 3 W.C. C. 74), *Maude* v. *Brook* ([1900] 2 W. C. C. 69), *Ferguson* v. *Green* ([1901] 3 W. C. C. 113).

Chester Jones for the respondent.

COLLINS, M.R.: I have come to the conclusion, though not without difficulty, that this appeal must be dismissed. I regret that we have again to consider the differences between various kinds of things which may or may not be scaffoldings. It seems to me that the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*) has now excluded from consideration all those matters which previously gave rise to much difficulty upon this question—that is, has excluded from consideration the object of the Legislature in introducing the condition that there must be a "scaffolding" in order to give a right to compensation. I found great difficulty in supposing that the Legislature intended that there should be a right to compensation whenever a man was using an arrangement of a special kind in order to do some insignificant kind of work upon a building. I thought that it was a condition necessary to a right to compensation that the special arrangement should bear some

relation to a building 30 feet high. That view has now been entirely overruled by the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). Now, as it seems to me, in the discussion of this question, this condition as to there being a "scaffolding" is practically an arbitrary provision of the Act without which the position of the parties would still be the same. The existence of a "scaffolding" may have no real effect upon the danger to the workman. We have now, therefore, to approach this question in a way different from that in which we approached it before the decision in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). No doubt some of the learned Lords in the House of Lords suggested that the standard to be applied is the popular meaning of the term "scaffolding." Lord Macnaghten said: "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary and unscientific the line of demarcation drawn by the Act may seem to be"; and he held that the term "scaffolding" might be answered by an arrangement consisting only of two trestles and a board. That, I must confess, does not seem to me to be the common and ordinary signification of the word. Lord Brampton went more specifically into the matter, and he said: "I entirely agree with Rigby, L.J., who, in *Maude* v. *Brook* (*sup.*), says: 'In construing the Act, we are not at liberty to confine the meaning of the word "scaffolding" to that which is its most usual form; anything whether usual or unusual that can properly be called a scaffolding is within the Act.'" There we have the opinion of Lord Brampton that a thing which is not ordinarily so called may be a "scaffolding." Lord Brampton then went on to adopt an old definition which described a scaffold as "a place erected above the ground with poles for walls and supports, and boards laid loosely for floors, to serve a present occasion of workmen standing safe and easily to preair or build a house," and then suggested that anything

suitable for the present occasion, which might be constructed in a variety of ways, was included in the term "scaffolding." In the present case the workman had to do some work upon a building of a height of more than 30 feet, and it was necessary for the workman to have a secure footing while doing that work. The contrivance which had been found to be most convenient for that purpose, and which was used in that case, was of this description: It was a long plank, 18 to 20 feet long and 10 inches wide, across which were nailed or screwed ridges of wood, to give the workman a grip on the board whilst at work; on the under side there was at the end a ridge of wood 9 inches deep and 3 inches thick, to hook over the ridge of the roof to hold the board while the men were on it. At the time when the accident happened, the condition of things was that one man was standing upon the ladder and was holding the end of the crawling board; the other man had to reach the ridge of the roof in order to adjust the other end of the crawling board, and for that purpose he had to go along the board while the man upon the ladder had to support it and lift it; one end of the board rested upon the hand of the man who was on the ladder, and the other end was upon the roof higher up. The workman went up the crawling board, and while doing so the board slipped and he fell to the ground. Now, can I say as a matter of law that such a contrivance, though not of an elaborate character, used for the purpose of supporting a workman while doing his work, could not be a "scaffolding" within the meaning of the Act, having regard to the case in the House of Lords? It seems to me that this contrivance fulfils the same conditions, having regard to the nature of the work, as an arrangement of trestles and boards. It formed a kind of platform from which the workman could do his work. It would, I think, be carrying refinement too far to hold that an arrangement of trestles and boards could be, but this arrangement could not be, a "scaffolding." If any principle of the kind were involved in the question, the danger to the workman in this case would be greater

than in the ordinary case of trestles and boards. Here there was a special contrivance which was usually adopted for the purpose of doing this kind of work when a workman has to be sustained in a position above the ground and affords him support in the necessary position for doing the work, just as much as a contrivance of trestles and boards. I am aware that it has been held, in *Wood* v. *Walsh* (*sup.*), that a ladder which was being used by a workman who was painting a house was not a "scaffolding," and that may be a decision of law. That does not appear to me to be consistent with the principles of the judgments of the learned Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). It seems to me, therefore, that we are not now incumbered by the decision in *Wood* v. *Walsh* (*sup.*). In that case ladders were being used for painting a house; a board was tied to a rung of one of the ladders, the other end resting on a window-sill; a workman on one of the other ladders was killed through the breaking of a rung. It seems to me that in the present state of the law a ladder might be a "scaffolding," and that it might be scaffolding whether it was placed upright against a wall or placed so as to lie upon a roof. This appeal must be dismissed.

STIRLING, L.J.: I regret that I am unable to agree, and I differ from my learned brothers with the greatest diffidence. It is our duty to give effect to the interpretation of the Act given by the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). The first question which arises is, what is the duty of the Court in a question of this kind? That has been laid down in the case in the House of Lords. Lord Macnaghten said: "The question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the County Court Judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion." The same was said in more detail by Lord Brampton, who said: "I thoroughly agree that the

arbitrator or County Court Judge is the proper tribunal to find every question of fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not 'scaffolding' within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, etc.; and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of sec. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment upon the question of law being open to review by the Court of Appeal." Therefore, it is not enough to say in this case that the County Court Judge has found as a matter of fact that this arrangement was a "scaffolding." His determination upon that question is, according to the judgments in the House of Lords, open to review in this Court, and it is open to us to say whether or not the arrangement in question is or is not a "scaffolding" sufficient to satisfy the statute. Then the next question is, What is a "scaffolding" within the Act? Upon that point I will refer to some observations in the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). Lord Macnaghten there said: "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be"; and Lord Brampton said: "I entirely agree with Rigby, L.J., who, in *Maude* v. *Brook* (*sup.*), says: 'In construing the Act we are not at liberty to confine the meaning of the word "scaffolding" to that which is its most usual form: anything, whether usual or unusual, that can

properly be called scaffolding is within the Act.'" Again, in the same case, Lord Lindley said: "What is meant by a scaffolding? Is any scaffolding meant? Is there any difference material to the present question between a scaffolding and a scaffold? . . . In my opinion anything which can fairly be called a scaffold is a scaffolding within the meaning of sec. 7, if used as mentioned in the Act." Therefore, the question for this Court is whether this arrangement can fairly and properly be called a scaffolding. What was this arrangement? It is thus described by the plaintiff in his evidence: "It is a long plank, 18 to 20 feet long and 10 inches wide, and across it are nailed or screwed ridges of wood to give us a grip on the board whilst at work. On the underneath side there is a ridge of wood, 9 or 10 inches deep and 3 inches thick, to hook over the roof ridge to hold the crawling board whilst we were on it." Is that a scaffolding within the meaning of the Act? To my mind it is not. It seems to me to be all ladder, and for this purpose a ladder is very often used. The structure had not been put into position at the time when the accident happened; it was being raised for the purpose of being used for the work. Suppose, however, that the crawling board had been hooked on to the ridge of the roof; there would then have been two ladders not joined together at all. Can these, either singly or together, properly and fairly be described in the ordinary use of language as a scaffolding? It is, I admit, difficult to define what a scaffolding may be. I can only say that this combination does not seem to me to be capable of being a scaffolding. Therefore, though with great diffidence, I must say that I think this appeal ought to be allowed.

MATHEW, L.J.: I think that there was abundant evidence to justify the conclusion to which the learned County Court Judge came upon the question in this case. There was abundant evidence before him that this was a mechanical contrivance ordinarily used for the purpose of repairing roofs. It is said that this was only a ladder; but the crawling board was used for a totally different purpose. It seems

to me that this case is within the spirit and intention of the Act, and that there is no good reason for drawing any distinction between this case and the other cases in which the contrivance used has been held to be a scaffolding. In my opinion this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Cameron, Kemm, & Co.*, for *C. D. Miller*, Derby; for the respondent, *Shaen, Roscoe, Massey, & Co.*

Also reported in (1902) 1 K. B. 494; 71 L. J. K. B. 252; 85 L. T. 574; 50 W. R. 263; 66 J. P. 389.

June 6, 1902.

MARSHALL *v.* RUDEFORTH.

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 752.

Scaffolding—Ladder.—SEC. 7, 1.

A ladder leaning against the parapet of a house does not necessarily amount to scaffolding.

THIS was an appeal by the applicant from an award made by the Judge of the Scarborough County Court.

The applicant was employed upon the repair of the roof of a building over 30 feet in height. He was injured while ascending a ladder, more than 30 feet long, which rested on the ground and the upper end against the parapet of the building.

The County Court Judge found as a fact that the building was not being repaired by means of scaffolding.

The applicant appealed.

A. P. Longstaffe for the appellant.

Ruegg, K.C., for the respondent, was not called upon to argue.

COLLINS, M.R.: In this case the learned County Court Judge has held that a ladder was not a scaffolding. The

facts were admitted. The workman was employed in carrying slates up a ladder for the repair of the roof of a house which exceeded 30 feet in height. The ladder was over 30 feet long, and the lower end rested on the ground and the upper end against the house. The County Court Judge has found as a fact that the ladder was not a scaffolding within the meaning of the Act. Unless we can say that as a matter of law the ladder must under these circumstances be a scaffolding, we cannot interfere with the decision of the County Court Judge. Looking at the various decisions upon this question, I am not now able to give any definition of a scaffolding, but we cannot say that as a matter of law a ladder is a scaffolding, and therefore we cannot say that the learned County Court Judge might not find that it was not a scaffolding without misdirecting himself. Therefore we cannot interfere with the finding of the County Court Judge, and this appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., agreed.

Appeal dismissed.

Solicitors for the appellant, *Iliffe, Henley, & Sweet,* for *T. Hart,* Scarborough; for the respondent, *Radford & Frankland,* for *John Whitfield,* Scarborough.

Also reported (1902) 2 K. B. 175; 86 L. T. 752; 50 W. R. 596; 18 T. L. R. 649.

June 4, 1902.

BURNETT *v.* DRURY LANE THEATRE (LIMITED).

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

The Times, June 5, 1902.

Factory—Theatre—Machinery.—SEC. 7, 2.

Hydraulic machinery used solely for the purpose of raising or lowering the stage of a theatre, with or without scenery upon it, does not constitute the machinery or the theatre a factory.

THIS was an appeal from an award of the Judge of the Shoreditch County Court.

The applicant for compensation was a stage carpenter at Drury Lane Theatre. He was working near the centre of the stage at some scenery which was being put up for a new play, and a number of his fellow-workmen were engaged in cutting tumblers. In the course of his work he stepped on one of the tumblers, and fell and injured his hand with a saw with which he had been working.

It appeared that hydraulic machinery was being used for the sole purpose of raising and lowering a part of the stage, with or without scenery upon it.

The County Court Judge held that the place where the applicant was working was a "factory," and he made an award in favour of the applicant.

The employers appealed, and it was contended on their behalf that there was no evidence on which the County Court Judge could rightly hold that the place was a factory within the Act.

Arthur Powell, K.C., and *Addington Willis* appeared for the employers; *Cyril Dodd*, K.C., and *E. A. Jelf* for the applicant.

The COURT allowed the appeal.

The MASTER OF THE ROLLS said the question was whether Drury Lane Theatre could be held to be a factory. It was sought to bring it within the definition of "factory" in two ways. First, it was said to come within sec. 93, sub-sec. 1 (*c*), of the Factory and Workshop Act, 1878, which defined "non-textile factory" as including any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the making of any article, and wherein steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. He did not think the hydraulic machinery used in the present instance brought the case within that section. Then it was said that the case came within sec. 23, sub-sec. 1 (V.) (*b*), of the Factory and Workshop Act, 1895, which included in the word "factory" the following: "Any premises on which

machinery worked by steam, water, or other mechaniacl power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building." Neither did he think this case came within that section. He thought there was no evidence on which the learned County Court Judge could hold that Drury Lane Theatre was a factory, and the appeal must therefore be allowed.

The LORDS JUSTICES delivered judgment to the same effect.

February 24, 1902.

HOARE *v.* TRUMAN, HANBURY, BUXTON, & CO.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

86 *L. T.* 417.

Factory—Adapting for Sale—Bottling Beer.—SEC. 7, 2.—*Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *sec.* 93.

Mixing gas and beer together and putting them into bottles is adapting an article for sale.

CASE stated.

The respondents were charged on an information that they, being the occupiers of a non-textile factory, did unlawfully employ a certain young person.

The respondents were on June 7, 1901, the occupiers of certain premises, which premises included a building used as a bottling stores.

The bottling stores were used by the respondents for the purpose of aerating and bottling beer, and the gas engines situate in the bottling stores were used by the respondents in the manner hereinafter mentioned.

The beer was so aerated and bottled for the purpose of adapting it for sale as bottled beer.

The beer was brought in barrels into the bottling stores. It was then forced out of the barrels into a cooling tank by

means of an air-pump, driven by mechanical power—to wit, a gas engine. Thence it was forced by an air-pump, driven by mechanical power, into a cylinder (hereinafter called the mixing cylinder) situate in a room adjoining.

The mixing cylinder contained a mechanical mixer rotated or driven by mechanical power—to wit, a gas engine. Attached to and communicating with the cylinder were high-pressure cylinders containing carbonic acid gas, which were brought already charged with such gas into the bottling stores. By the action of the mixer, the beer and the carbonic acid gas were mixed together and the beer aerated.

It was the duty of the young person to place an empty bottle in the bottling machine and pull down by hand into the neck of such bottle, by means of a lever, the nozzle of a tap communicating by a pipe with the mixing cylinder. The beer flowed through the pipe from the tap owing to the pressure of the gas with which it had been aerated and filled such bottle. The bottling machine was not worked by mechanical power.

The bottles before being filled were drained and soaked by hand, and afterwards rinsed out by a brush driven by a gas engine on another floor of the premises.

The magistrate dismissed the information.

Sutton (*G. S. Robertson* with him), for the appellant, cited *Law* v. *Graham* ([1901] 3 W. C. C. 191), *Petrie* v. *Weir* (Ct. Sess. Cas. 5th series, vol. 2, 1041), *Henderson* v. *Glasgow Corporation* (Ct. Sess. Cas. 5th series, vol. 2, 1127).

Travers Humphreys for the respondents.

Lord ALVERSTONE, C.J.: When the words of this section are read, I think it is quite clear that in this case the magistrate ought to have convicted. The facts show that upon these premises and in the curtilage carbonic acid gas and beer are mixed together by mechanical means and are then together put into the bottles. It seems to me that that is clearly a case of adapting for sale beer, and adapting for sale bottled beer. Under those circumstances, there having been manual labour on those premises at the same time

there is this mechanical power which is used for that purpose, the words of the section are fulfilled. I wish only to say that I think the distinction which I drew in *Law* v. *Graham* (*sup.*) is right, and that it certainly is no authority against the view we are now holding. There we thought we could not overrule the magistrate, who came to the conclusion that the washing of the bottles was not doing anything incidental to the adapting for sale of bottled beer. Whether we were right or wrong in that case, it certainly is no authority against the view we are now taking in this case, and I think the case should go back to the magistrate to convict.

DARLING and CHANNELL, JJ., concurred.

Appeal allowed.

Solicitors: *The Solicitor to the Treasury; Clapham, Fitch, & Co.*

Also reported in 71 L. J. K. B. 380; 86 L. T. 417; 50 W. R. 396; 66 J. P. 342.

May 29, 1902.

KENNY *v.* HARRISON AND ANOTHER.*

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

113 *Law Times*, 158.

Dock.—SEC. 7, 2.

A part of a dock does not necessarily cease to be a "dock" because it is temporarily let and used for stacking timber.

THE plaintiff was a workman who was injured by accident arising out of and in the course of his employment by the defendants on, in, or about a place which was alleged to be a "wharf" or "quay."

The North-Eastern Railway Company were the owners

* This report, taken from "Notes of Cases not yet Reported," in 113 Law Times Journal, 158, is only inserted because the case has found a place in The Law Reports.

of a large tract of land by the sea between Hartlepool and West Hartlepool, which was bounded on the east and west sides by the company's railways, on one side by the sea, and on the fourth side by a fence running from the one line of railway to the other. There was a large system of docks upon this land; the whole area was 400 acres, 200 acres of which were covered with water. A small part of the dry area was leased by the company for shipyards, but by far the greater portion was used for the stacking and storage of timber. At the time when there was a duty upon imported timber the docks were used as bonded docks for timber, and until the duty was paid merchants' stocks of timber remained at the merchants' expense upon plots of land set apart for the purpose. After the removal of the timber duty merchants were allowed by the company to keep their stocks of timber upon parts of the land on payment for the occupation, and a large part of the land was thus used by the defendants and two other firms of timber merchants. The defendants had the exclusive occupation of about four acres of the land, which they were only allowed to use as a timber-yard, the company being entitled to resume possession at any time on giving fourteen days' notice. The defendants' plot was not in any way fenced off from the rest of the premises, and the place where the accident happened was about 120 feet from the water, and about 280 feet from the external boundary of the company's premises. The timber which came by ship for the defendants was generally moved by trucks to their plot of ground, but was sometimes carried there by their workmen.

The County Court Judge, after hearing the evidence, viewed the premises himself, and then held that the place in question was a "wharf" or "quay" within the meaning of the Act; and he made an award in favour of the plaintiff.

The defendants appealed.

Held (dismissing the appeal), that the County Court Judge had properly found that the place in question was a "wharf" or "quay" within the meaning of the Act.

Counsel for the appellants, *Ruegg*, K.C., and *E. Shortt;* for the respondent, *Simey*.

Solicitors for the appellants, *Bell, Brodrick, & Gray*, for *Harrison & Barker*, Hartlepool; for the respondent, *J. E. & H. Scott*, for *J. R. Fryer*, West Hartlepool.

Also reported in (1902) 2 K. B. 168.

November 7, 1901.

ELLIS *v.* CORY & SONS.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 499.

Wharf—Floating Structure not Contiguous to Land.—SEC. 7, 2.

A floating structure was moored in the Thames, by chains fastened to piles driven into the bed of the river, at a distance of 500 feet from the one shore and 350 yards from the other shore; it was 500 feet long 45 feet wide, had a draught of 6 feet 6 inches, and was 6 feet above the water level; there were upon it nine hydraulic cranes with grabs attached, which descended into the holds of coal steamers moored alongside, and took up automatically about a ton and a half of coal, which was lifted by the cranes and turned round into a hopper, where it was automatically weighed, and was then passed through a shoot into barges lying on the other side of the structure. There was a blacksmith's shop, a carpenter's shop, a plant for generating electricity, and a coffee shop for the men on the structure. There was no connection between the structure and the shore except by boats.

Held, that the structure in question was a "wharf."

THIS was an appeal by the applicant from the award of the County Court Judge at Woolwich.

The applicant was injured on, in, or about a structure which was moored in the Thames, by chains fastened to piles driven into the bed of the river, at a distance of 500 feet from the south shore and 350 yards from the north shore. It was 500 feet long, 45 feet wide, had a draught of 6 feet 6 inches, and was 6 feet above the

water level. There were upon the structure nine hydraulic cranes with grabs attached. The grabs descended into the hold of a coal steamer moored alongside the structure, and took up automatically about a ton and a half of coal. The hydraulic crane lifted up the grab with the coal and turned it round into a hopper, where it was automatically weighed, and then passed it through a shoot into a barge lying on the other side of the structure. There was a blacksmith's shop, a carpenter's shop, a plant for generating electricity, and a coffee shop for the men on the structure. There was no connection between the structure and the shore except by boats.

The County Court Judge held that the structure in question was not a "wharf."

The applicant appealed.

Ruegg, K.C., and *W. M. Thompson*, for the appellant, cited *Haddock* v. *Humphrey* ([1900] 2 W. C. C. 77).

Bankes, K.C., and *H. Nield*, for the respondents, referred to *Hennessey* v. *M'Cabe* ([1900] 2 W. C. C. 80).

COLLINS, M.R.: The only question in this case is whether the thing which has been described is, or is not, a "wharf." It certainly fulfils some of the primary functions of the thing which is commonly known as a wharf; it is used for carrying a crane for the purpose of moving goods from one vessel to another; it is moored to the bed of the river, so as to be sufficiently permanent and stable for that purpose, at a distance of about 500 feet from the shore. It is, indeed, admitted by the respondents that it is a structure of such a kind that, if it were capable of being reached from the shore by a bridge or some other connection, it would be a wharf. It is contended, however, that it is so far out in the water that it cannot come within the ordinary meaning of a wharf. It is quite likely that, when the term "wharf" was introduced into the Factory Acts in connection with the terms "dock" and "quay," such a structure as this was not in use at all; but I think that we ought not now, when these new contrivances are used and are well known, to limit the

meaning of the term "wharf" to those things only which were formerly used and known. We now find this particular kind of construction being used for the purposes of a wharf, and it is adapted for being used at a greater distance from the shore than an ordinary wharf, so as to save time and labour. It seems to me that it clearly was intended that structures of this kind should be included within the term "wharf" as used in the Factory Acts. There is no real difference, except the distance from the shore, between this construction and that which has always been known as a wharf. I think, therefore, that this thing must be held to be a wharf within the meaning of sec. 7, and that this appeal must be allowed.

STIRLING, L.J.: I agree.

MATHEW, L.J.: This structure was clearly intended to economize time and labour in the unloading and loading of vessels. It was formerly the practice to bring a vessel alongside the shore and to unload it on to the wharf, and then to load the cargo again on to another vessel. It has now been found that that operation is better performed by having a structure of this kind. It is admitted that, if the structure were within a few feet of the shore, it would be a wharf. It seems to me that, although the structure is removed further into the water for the convenience of the operation of unloading and loading, yet it is a wharf within the meaning of the Act.

Appeal allowed.

Solicitors for the appellant, *Buchanan & Hurd;* for the respondents, *Deacon & Co.*

Also reported in (1902) 1 K. B. 38; 71 L. J. K. B. 72; 85 L. T. 499; 50 W. R. 131; 66 J. P. 116; 18 L. T. R. 28.

November 9, 1901.

WILMOTT *v.* PATON.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 569.

Mechanical Power—Warehouse.—SEC. 7, 2.

The other power referred to in the expression, "steam, water, or other mechanical power," is *ejusdem generis* as steam or water power.

Premises need not be adjacent to water to constitute a warehouse.

THIS was an appeal by the respondent from the award of the County Court Judge at Pontypool.

The applicant claimed compensation as a dependant of a workman who was killed on, in, or about premises which were alleged to be a "factory." The said premises were used for the purpose of breaking up old iron and storing it for sale. A very large quantity of old iron, amounting to several thousand tons, was usually kept stored in large covered buildings upon the premises. The premises were not connected with any dock, wharf, or quay, and were not contiguous to any water. The only machinery used upon the premises were a hand winch and an instrument used for breaking up old iron, which was also worked by hand.

The County Court Judge held that the premises were a "factory," because "other mechanical power" was used therein, and also because they were a "warehouse," and made an award in favour of the applicant.

The respondent appealed.

Ruegg, K.C., and *A. Parsons*, for the appellant, cited *Wrigley* v. *Bagley & Wright* ([1901] 3 W. C. C. 61), *Haddock* v. *Humphrey* ([1900] 2 W. C. C. 77).

Clavell Salter and *Minton-Senhouse* for the respondent.

COLLINS, M.R.: This case comes before us in an unsatisfactory manner, there being no note of the facts admitted at the hearing. Two points have been raised. No evidence

was given at the hearing, but the case was argued upon a state of facts which was verbally agreed. The workman was killed by an accident which arose out of and in the course of his employment. A contrivance was used upon the premises which was worked by hand power. The statement as to what the premises were is meagre. It was first contended for the applicant that the premises were a "factory," because machinery was used which was actuated by "steam, water, or other mechanical power." It was said, and the County Court Judge so held, that in this case the machinery was worked by "mechanical power," when it was actuated by hand power, and that, therefore, these premises were a "factory." Upon that part of the case I cannot agree with the learned Judge, because of what was decided by this Court in *Wrigley* v. *Bagley & Wright* (*sup.*). It is true that that point is not mentioned in the headnote to the report, but it is clear from the argument and judgment that this point was taken, and was overruled. Therefore the first part of the decision, I think, was wrong. The next point taken on behalf of the applicant, and decided in his favour, was that the premises were a "warehouse." It is not fair to ask this Court to decide that question when there is no statement of the facts upon the Judge's notes. The onus is upon the appellant to show that there was no evidence. I think that, upon the admitted facts as stated to us, there was clearly a *primâ facie* case that these premises were a "warehouse." The premises were used for the business of breaking up old iron for sale, and very large quantities of old iron were kept stored in large covered sheds upon the premises. It is impossible for us to say upon those facts that these premises were not a "warehouse." It may have been that there were other facts which might alter that view, but it does not appear that they were brought before the County Court Judge. The real point taken was that these premises were not a "warehouse" because they were not in contiguity to a dock, wharf, or quay, and that the term "warehouse," being used in conjunction with the words

"dock, wharf, or quay," must be construed to mean something which is contiguous to a "dock, wharf, or quay." I am not prepared to so hold, and I find nothing to that effect in the Act. This appeal must be dismissed.

STIRLING, L.J.: I am of the same opinion. I agree with the judgment of the Master of the Rolls upon both points. As to the first, if every instrument in which mechanical power was used was "machinery" within the Act, then every place, in which a pulley, or a crowbar, or any other mechanical power is used, would be a "factory." The other question is whether the term "warehouse" in this Act is to receive its ordinary meaning or not. It is contended that it is not to receive its ordinary meaning, because it is used in a section which says "dock, wharf, quay, or warehouse," and that therefore a "warehouse" must be something in the neighbourhood of a dock, wharf, or quay. That is, in my opinion, too narrow a construction.

MATHEW, L.J.: I agree upon both points.

Appeal dismissed.

Solicitors for the appellant, *W. Hurd & Son*, for *Lewis E. Webb*, Pontypool; for the respondent, *Le Brasseur & Oakley*, for *Le Brasseur & Bowen*, Pontypool.

Also reported in (1902) 1 K. B. 237; 71 L. J. K. B. 1; 85 L. T. 569; 50 W. R. 148; 66 J. P. 197.

January 7, 1902.

HUNT *v.* GRANTHAM CO-OPERATIVE SOCIETY.

Before His Honour JUDGE WIGHTMAN WOOD.

112 *Law Times*, 364.

Warehouse.—SEC. 7, 2.

A loft over a stable, forming part of a large block of buildings where the business of general storekeepers is carried on, and used for storing goods until required for sale, does not make the premises a warehouse.

AT the Grantham County Court his HONOUR gave judgment in this case.

R. F. M. White for the applicant; *Somers* (Manchester) for respondents.

His HONOUR: The applicant in this case was in the employ of the Grantham Co-operative Society, at their stores. They carry on there a general business, with several different departments. . . . In a case I had at Leicester of *Smith* v. *Turner* ([1901] 3 W. C. C. 143), I held that a room which formed part of a workshop, and in which the materials were stored which were afterwards worked up in the workroom, was not a warehouse within the Act, and I hazarded the opinion in that case that, having regard to the collocation of the words "dock, wharf, quay, warehouse," the only warehouses intended to be within the Workmen's Compensation Act were warehouses used in connection with docks, wharves, or quays. But that opinion has been rendered of no effect by the case of *Wilmott* v. *Paton* (*ante*, p. 65). Therefore the matter now stands thus—that though the Legislature apparently intended that some kinds of warehouses should be excluded from the provisions of the Workmen's Compensation Act, it has so expressed itself as to bring every warehouse, properly so called, within the Act. The question, therefore, I have to decide is whether the place where the applicant was at work can be properly described as a warehouse. It seems to me that in ordinary parlance no one would speak of it as a warehouse. It was a single loft, about 30 feet long by 15 feet wide, over a stable forming part of a block of buildings at which the business of these stores was mainly conducted. The loft was used for the purpose of storing goods which were required for sale by the respondents to their customers in the ordinary course of business. Every large shop must require similar accommodation. I think it is necessary to draw a distinction between a building the main purpose of which is the warehousing of goods, and a room, cellar, or loft used for storing goods where such storage is ancillary only to the business carried on in the main portion of the premises. In ordinary parlance the former is spoken of as a warehouse, and the latter as a

storeroom. There may be some goods sheds and other places with regard to which it would be difficult to say to which category they properly belong, but in the present case I have no hesitation in holding that the place where applicant was employed was a storeroom and not a warehouse. I am therefore of opinion that the claim for compensation fails.

November 9, 1901.

ELLISON *v.* LONGDEN & SON.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 48.

Mine—Roadway.—SEC. 7, 2.

A roadway leading up to a mine, the making of which is part of the necessary work of preparing and working the mine, may be a mine.

THIS was an appeal from an award of the Judge of the Sheffield County Court.

The question was whether the employment was on or in or about a mine.

The accident happened while the applicant was at work on Loxley Common blasting large boulders of stone for the purpose of making a road in the employment of George Longden & Son, who were the lessees of some coal mines under the Common. The explosion which was the cause of the accident took place about six or seven yards from the mouth of a tunnel running into the side of a hill.

The contention on the part of the employers was that the *locus in quo* was not a mine at the time of the accident, and that it did not become a mine until December 14.

The County Court Judge found as a fact that the road-making was part of the necessary work of preparing and working the mine. He also found that the mine was worked in the usual way, by the sinking of a shaft, by

driving levels and inclined planes for commencing and opening the mine, and for searching for and proving minerals, and by driving a heading into the hillside. He accordingly made an award in the applicant's favour.

The employers appealed.

Danckwerts, K.C., and *Sims* appeared for the employers; *H. W. W. Wilberforce*, for the applicant, was not called upon.

The MASTER OF THE ROLLS said that in his opinion the decision of the County Court Judge ought not to be disturbed. The question was whether there was any evidence to support his finding of fact. It was necessary for the applicant to show that he was employed on or in or about a mine. A "mine" meant a mine to which the Metalliferous Mines Regulation Act, 1872, applied. By sec. 41 of that Act "mine" included "every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to the mine." Having regard to that definition he thought the County Court Judge had abundant evidence before him to justify him in finding that the applicant was employed on or in or about a mine. The appeal must therefore be dismissed.

The LORDS JUSTICES delivered judgment to the same effect.

Solicitors: *Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield, for the employers; *Aldous & Welfare*, for *J. E. Wing*, Sheffield, for the applicant.

June 4, 1902.

FLETCHER *v.* LONDON UNITED TRAMWAYS (LIMITED).

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 700.

Engineering Work—Railroad—Tramway.—SEC. 7, 2.

An electric tramway was in course of construction for the purpose of extending the lines of a light railway. It was constructed, after application to the Light Railway Commissioners, under the powers of the United London Tramways Act, 1900, which incorporated Parts II. and III. of the Tramways Act, 1870.

Held, that the tramway was a railroad within the meaning of the definition of "engineering work."

THIS was an appeal by the applicant from an award of the Judge of the Brentford County Court.

The case is reported in *The Times*, October 12, 1901.

The company were the owners of a light railway which was made along the public highway leading from Uxbridge to Hanwell.

Being desirous of extending the line, they made an application to the Light Railway Commissioners, but failed to get the necessary authority. They then applied for and obtained a private Act of Parliament, the London United Tramways Act, 1900 (63 & 64 Vict. c. cclxxi), which authorized them to extend their line from Hanwell to Acton. This Act, by sec. 2, incorporated sec. 3 (interpretation of terms) and Parts II. and III. of the Tramways Act, 1870. They afterwards extended their line from Acton as a light railway.

Though the line was constructed in this way, it was in fact one continuous line, worked by electricity on the overhead system, and running on a level with the public highway, and cars ran along it from one end to the other without any change.

The part of the line on which the applicant was working

when he met with the accident was the part between Hanwell and Acton, constructed under the private Act of 1900.

At the hearing of the application the County Court Judge held that the word "railroad" in the definition of "engineering work" was synonymous with "railway," and that the workman's employment was not on, in, or about a "railway" within the definition in sec. 7.

The workman appealed.

Compston, for the workman: The workman's employment was on the construction or repair of a "railroad," and therefore on an "engineering work." "Railroad" does not necessarily mean the same thing as "railway." It is a word that came into use before "railway," and it is quite applicable to a "tramway," which is an older invention than a "railway." The Legislature, after using, and carefully defining, the word "railway," has in this definition of engineering work deliberately used the word "railroad." From that the proper inference to be drawn is that they intended to refer to something different from a "railway." The word was meant to cover things which do not come within the strict definition of "railway." Under the Employers' Liability Act, 1880, it has been held that the word "railway" included a temporary railway laid down by a contractor for the purpose of construction of works: *Doughty* v. *Firbank* (10 Q. B. D. 358).

Ruegg, K.C. (*R. P. Glasgow* with him), for the company: The line was a tramway, pure and simple, subject to the Tramways Act, 1870. A tramway is a thing the meaning of which is as well known as that of a railway. The Legislature has been careful to make this Act applicable to employment on a "railway" by specially naming that employment. If it had intended to make the Act applicable to employment on a tramway, it would surely have named tramways just as it has named railways. The word "railroad" is synonymous with "railway." That seems to have been the opinion of the late Master of the Rolls: *Fullick* v.

Evans, O'Donnell, & Co. ([1901] 3 W. C. C. 164). The word "railroad" in this section may well be limited to mean a railway in course of construction or one not open for public traffic, which would not come within the definition of "railway" given in sec. 7.

COLLINS, M.R.: I think that the appeal must be allowed. The workman was engaged at the time of the accident in the construction or repair of part of a line which was one continuous line, though different parts of it were governed by different statutory provisions. The line began as a light railway, then came a piece of it which was governed by the Tramway Acts, and then the rest of it was apparently a light railway. The carriages were moved along the line by electricity, and the part of the line where the workman met with the accident for which he claims compensation was an ordinary electric tramway. The first ground on which it was sought to show that the workman was entitled to compensation was that his employment was on a "railway." The County Court Judge held that the line on which the workman was engaged was not a "railway," and I see no reason for differing from him on that point. It was then argued that the workman was employed on an "engineering work." The expression "engineering work" is defined as including "any work of construction or alteration or repair of a railroad." The Legislature there introduced into the Act for the first time the word "railroad," having previously used the word "railway." Now, there is no presumption that the Legislature, when using different words, intended to mean the same thing. In itself the word "railroad" would include a tramway, and it seems that formerly the word was used to describe that which we should now call a tramway. I cannot see why the word in this section should not be construed as embracing a tramway. We can only exclude a tramway from being an "engineering work" by saying that "railroad" means exactly the same thing as "railway." The word "railroad" may very well be used as a genus of

which a "railway" is a species. From the fact of the use by the Legislature of the word "railroad" here, after previously legislating as to a "railway," I think a presumption arises that "railroad" was intended to mean something different from "railway," and its meaning was probably intended to have a larger ambit. The workman was here engaged in working on what is in fact a railroad, and he was *primâ facie* therefore engaged on an "engineering work."

MATHEW, L.J.: I am of the same opinion. The Legislature has defined "railway" in an earlier part of the section, and then it has added this definition of "engineering work" as a comprehensive expression to apply to other matters not included in previous definitions.

COZENS-HARDY, L.J.: I am of the same opinion. I see no reason for saying that when the Legislature used the word "railroad," after making provisions as to a "railway," it did not intend to use a word of larger meaning than "railway." It was argued that "railroad" should have been limited to mean a line which, when completed and in working order, will come within the definition of "railway." But that argument cannot be right, because the definition of engineering work is applicable not merely to the construction of a railroad, but also to its "repair." The case of *Fullick* v. *Evans* (*sup.*) does not seem to me to be opposed in any way to our decision. All that was then decided was that a signal-box on a new railway line was covered by the word "railroad."

Appeal allowed.

Solicitor for the applicant, *Walter Turner;* for the respondents, *Hugh C. Godfray.*

Also reported in (1902) 2 K. B. 269; 71 L. J. K. B. 653; 86 L. T. 700; 50 W. R. 597; 18 T. L. R. 639.

May 16, 1902.

COOPER & CRANE *v.* WRIGHT.

Before Earl of HALSBURY, L.C., Lords SHAND, DAVEY, BRAMPTON, and ROBERTSON.

86 *L. T.* 776.

Undertaker—Sub-contractor.—SEC. 7, 2; SEC. 4.

A sub-contractor for part of the construction of a building may be an "undertaker" (Lords Robertson and Brampton *diss.*).

THIS was an appeal from a judgment of the Court of Appeal (Smith, Collins, and Romer, L.JJ.) reversing an order in favour of the appellants made by the County Court Judge of Nottingham.

The facts are fully set out in the judgment of Lord Brampton.

Llewelyn Davies and *T. Lindley*, for the appellants. They cited *Cass* v. *Butler* ([1900] 2 W. C. C. 87), *Mason* v. *Dean* ([1900] 2 W. C. C. 91), *Hoddinott* v. *Newton, Chambers, & Co.* ([1901] 3 W. C. C. 74), *Cooper* v. *Davenport* ([1900] 2 W. C. C. 44).

Ruegg, K.C., and *Clavell Salter* for the respondent.

May 16.—Their Lordships gave judgment as follows:—

Lord ROBERTSON concurred in the judgment of Lord Brampton.

Lord BRAMPTON: My Lords. The question for your Lordships' decision had arisen out of the following circumstances: Barker & Co., as building owners, entered into a contract with the appellants—Cooper & Crane, a firm of builders—by which they undertook to construct for the building owners the whole of a building, including the roof and slating. Cooper & Crane made a sub-contract with the respondent Wright, a slater, whereby he agreed to supply the slates and do for them all the slating work of the roof. Cooper & Crane began to carry out their contract with the

building owners, and by means of scaffolding had constructed the building to a height exceeding 30 feet, including the framework of the roof, ready to receive the slating. The respondent Wright then began to fulfil his sub-contract, the deceased man, named Brady, being employed by Wright as a labourer to convey slates to the roof. His widow gave notice of the accident to Cooper & Crane and to Wright. No agreement for compensation having been come to, the widow filed a request for an arbitration between herself, Cooper & Crane, and Wright. Cooper & Crane, by their answer, denied their liability to pay any compensation to the widow, on the ground (amongst others) that the deceased man was not immediately employed by them, but by Wright, their sub-contractor. Alternatively they claimed against Wright an indemnity in respect of any amount which might be awarded to be paid by them. Wright, by his answer, denied that he was the undertaker of any work to which the Act of 1897 applies. The case was heard by the County Court Judge, when he made his award for payment of the sum of £217, with costs, by Cooper & Crane, as undertakers of the building. He made no award against Wright. A few days afterwards he made a further order (that now in question) whereby, after reciting the award I have just mentioned, he found that Wright was the original employer of the deceased man, that he had under his sub-contract with Cooper & Crane, the undertakers, himself undertaken the slating of the roof, and so become the person who undertook the construction of a substantial part of the building. Upon these findings he made the order on Wright for the indemnity as claimed. No appeal was made by Cooper & Crane against the award for compensation. Against the order for indemnity Wright appealed, and the Court of Appeal set it aside upon the ground that a mere sub-contractor is not an undertaker within the meaning of the Act. In my opinion that decision was right, and I will proceed to state my reasons for so thinking. I desire, however, first to remind your Lordships, very shortly, of the

difficulties which before the Act of 1897 beset a workman who sustained injury in the course of his employment, in seeking to obtain redress, for I think that, by bearing them in mind, they will assist in enabling your Lordships to form a reasonable conjecture as to the objects which the Legislature had in view in passing that Act, and thus in interpreting the enactments contained in it, to which I shall have occasion to refer. In the first place there was no available process known to the law by which such redress could be recovered except by action at law or by proceeding under the Employers' Liability Acts; but no such action or proceeding could be successful unless the workman was in a condition to prove by legal evidence that his injury was due to actionable negligence or other misconduct or default of the person from whom he sought to recover, or some other person or persons for whose negligence he was responsible. Compensation without proof of such negligence was unheard of, and such proof was often hard to discover. Moreover, it was often extremely difficult, even when the facts were ascertained, to determine who was the person liable to be sued in the action; and to avoid such difficulties many persons were often made defendants in actions who were under no legal liability. Added to these obstacles, the law itself was for the most part too uncertain, too dilatory, and far too expensive for an ordinary workman to embark in. Good illustrations of these difficulties will be found in *Wiggett* v. *Fox* (11 Exch. 832) and *Johnson* v. *Lindsay* ([1891] A. C. 371). Having regard to this unsatisfactory state of things, it was, as I have gathered from a study of the Act, felt by the Legislature that it would be but just and right to confer upon a large class of workmen whose necessities compelled them to seek employment in certain specified dangerous occupations, in the course of which accidents not always possible to be guarded against are of frequent occurrence, some purely casual, others no doubt attributable to negligence or default of fellow-workmen, whom it would be idle to sue, or others whose identity could not be established, a right to

claim compensation to a moderate and limited amount in respect of the loss of such wages as they were incapacitated from earning in consequence of accidental injury, upon mere proof of the accident and its resulting loss, irrespective of its cause. Another object was to impose the obligation of providing such statutory compensation upon those to whom good sense would naturally point as the fittest persons to bear it, and to define, for the convenience of an injured workman seeking compensation, the persons from whom he was entitled to claim it; and, further, to provide a simple proceeding, entailing comparatively trifling expense, by which such compensation might, if necessary, be enforced. To carry out these very laudable objects the Act of 1897 was passed. It is, however, so framed as to provoke rather than minimize litigation; and those who are responsible for the language of some of its enactments little knew the amount of labour which they were entailing upon those whose duty it might be to interpret them. I turn now to the Act itself. Sec. 1, imposing upon "his employer" the liability to pay compensation to a workman, must be read by the light of sec. 7, 1, which enacts: "This Act shall apply only to employment by the undertakers" as defined. It follows that the general words "his employer" in sec. 1 must be read as "his employer, being also the undertaker." In this case the deceased man having been employed by Wright, the sub-contractor, and not by Cooper & Crane, the undertakers, his employment, although on the work undertaken by Cooper & Crane, was not, in my opinion, an employment to which alone the Act applies. It is obvious that the Legislature did not intend that such a workman, who had been exposed to equal risks and dangers with his fellow-workmen, should be excluded from the benefit of the Act; this is apparent from sec. 4, which in substance provides that the undertakers of works of construction of or on buildings shall be responsible for compensation to injured workmen employed by their sub-contractors as if they had been employed by the undertakers themselves. That the widow was entitled to

compensation from Cooper & Crane as the undertakers seems to me to admit of no possible doubt. The Judge was right, therefore, in his award of compensation against them. Even had this been open to question, no appeal against it having been made, that award was not during the argument, and cannot now be questioned. The real question before your Lordships arises out of the claim of Cooper & Crane for indemnity from their sub-contractor, Wright. The case in support of that claim is thus put: That, by his sub-contract with Cooper & Crane, Wright became an "undertaker" equally with them within the meaning of the 7th section, and was in every respect under the same primary obligation to pay compensation to the widow; and that such liability was a liability imposed by secs. 1 and 7, independently of sec. 4, so as to bring him within the proviso in that section, and to give them a right to claim indemnity from him. I do not think that these propositions can be maintained. First, Wright was not an undertaker within the meaning of sec. 7 of the Act. It may be that in the ordinary common acceptation of the expression a man may be said to undertake anything which he has taken upon himself to do, with or without a contract; but this is not the interpretation contemplated by the framers of the definition clause. The Legislature, in using the expression "the undertakers," has given it a limited statutory meaning, beyond which it cannot be extended. The whole Act is new to the law; it gives new rights to workmen and imposes new obligations upon employers, and, so far as it can be, it must be strictly construed. To bring any person within the definition clause he must have undertaken some definite specific work of construction which is to form the subject of his undertaking. In this case it was for the construction of an entire building. Secondly, the contract of the undertaker must be with a person who has authority to employ and to authorize the undertaker to accomplish the work undertaken. For such a work as the construction of an entire building, as in the case before us, it seems to me that two persons or sets of

persons only can fill the position of "the undertakers" defined by the Act. The building owner who takes upon himself the construction of the building which he requires, or the persons who, through the medium of a contract with him, engage to take upon themselves the obligation of executing that work for him. I carefully abstain from expressing any opinion touching the responsibility of a building owner who sub-divides the construction of a building among several contractors, because, in this case, Cooper & Crane, by their contract with him, undertook the construction from the foundations to the top of the roof. By that contract they constituted themselves "the undertakers" of the whole building within the definition in sec. 7, sub-sec. 2. From that contract they could not recede or be discharged, unless with the assent of the building owner, until the building was completely constructed; and to the execution of their undertaking they were bound to bring their personal skill and experience, and to exercise personal control over all the necessary operations. There was beyond this an obligation, attached by the statute to their undertaking, towards every workman employed by them on that work undertaken, to pay to him, in the event of injury to him by accident, compensation according to the Act. Neither the contractual obligation to the building owner nor the statutory obligation to the workman could be terminated or altered at the mere will or by any act of the undertakers. They could not assign their contract or any part of it, nor could they delegate their authority or any part of it to another. It is obvious that such authority of the undertakers must emanate from the building owner himself, for no one else could confer it. In most cases, I have no doubt, it is immaterial to the building owner whether his undertaker employs his own materials and workmen or engages another to do isolated portions of the work for him; but the building owner has no contractual relations with the sub-contractor, and can only look upon him as a mere *employé* of those with whom he has himself contracted.

The very name sub-contractor imports that he occupies an inferior position to the persons who have undertaken responsibility for the whole building, and that while they are bound to exercise control over his work, he cannot control any of theirs. Those who are pleased to do so may call him a sub-contractor or a sub-undertaker, for every day-labourer undertakes to do his work, but he is not an undertaker as defined by the statute (see *Percival* v. *Garner* ([1900] 2 W. C. C. 99)). If undertakers could add to their numbers by sub-contracts for different parts of a building, there would be no limits to their number; this would greatly tend to defeat the object of the Legislature in its endeavour to assist the workmen by pointing out specifically the persons to whom he may look for compensation. Moreover, I can conceive none on whom the obligation to pay compensation could more reasonably rest than on those who, as a matter of business, have undertaken the whole control and every responsibility attaching to the erection of the building which they have undertaken to construct. One must be careful not to be led astray by cases where the building owner, as in the case of *Mason* v. *Dean* (*sup.*), has reserved out of his contract with the undertaker the execution of a portion or portions of the building which he requires to be erected, and himself contracts with some other person or persons to do such portion or portions, for there is a wide and marked difference between undertakers as defined by contracts direct with the building owners and sub-contractors with persons who are themselves already under a binding contract to undertake the whole building. I cannot see how the two positions of undertaker and sub-contractor with the undertaker for the same work can exist at the same time in one person, any more than that one person could at the same time be both master and servant. Yet that would be the position of Wright if, being a mere sub-contractor, he were to be treated also as the undertaker of the same work. The language of sec. 4 indicates a thorough appreciation by the Legislature of the difference between undertakers to whom the Act

applies, and a sub-contractor with them for the execution of part of the work. It nowhere speaks of or refers to sub-contractors as undertakers; and if it had been intended that they should be so considered with all their obligations, it is impossible to suppose that it would not have imposed those obligations and expressed such intention in clear intelligible language. In *Cass* v. *Butler* (*sup.*) the Court of Appeal expressly held that a sub-contractor with and under those who are already undertakers is not an undertaker within the meaning of the Act, and the same was held in *Cooper* v. *Davenport* (*sup.*). These cases are in point, and I think that they were correctly decided. *Hoddinott* v. *Newton, Chambers* (*sup.*) was suggested as some authority for the appellants. When the facts of that case are carefully considered it will be found that it really does not in the least assist the appellants. No question as to the liability of a sub-contractor arose or was discussed in it. I see no similarity between that case and this. All these considerations have satisfied me that the Act by no reasonable interpretation can be held to make a mere sub-contractor an undertaker within the meaning of the Act. If I am right in this view, it is admitted that the appeal must fail, for Wright does not come within the proviso to sec. 4. But even if Wright could, contrary to my opinion, be considered such an undertaker, with an obligation equal to that of Cooper & Crane to pay compensation, I fail to see upon what ground the claim of Cooper & Crane for indemnity as distinguished from contribution can be supported in this case. The common law certainly would not enable one of two persons, each equally liable to pay statutory compensation to an injured workman, who had paid such compensation in full, to obtain indemnity against the other for the full amount so paid. To justify such a claim some enactment by statute, or some contract between the parties, would be necessary. No such enactment or contract has been shown to exist in this case. I do not think that a doubt could be entertained that if the accident was caused by the actionable misconduct of a stranger, and

the injured workman elected to proceed against the undertakers, being employers, they are, by sec. 6, entitled to indemnity from that stranger, and so indemnity might be claimed if the accident was caused by any person, whether the employer or not, under circumstances which would have entitled the injured man to maintain an action or proceedings under the Employers' Liability Act. It is very reasonable that it should be so, and I think that this is what the Act intended by the language employed. But there is not to be found in the Act anything expressly, nor as, I think, impliedly creating in the possible event of there being two or more undertakers, all being equally liable for compensation, and neither guilty of actionable negligence, an obligation of indemnity in the event of some only of them being called upon to pay. But I would point out another objection to the claim for indemnity. The proviso in sec. 4 is that "the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." Now, if it could be truly said that Wright was one of the defined undertakers mentioned in that section, and that there was a common obligation as undertakers upon Cooper & Crane and Wright, how can it be said that Wright was some person other than the undertakers; treating him as a mere sub-contractor, this objection could not arise. In my opinion Cooper & Crane were the only undertakers within the definition of sec. 7, sub-sec. 2, of the Act; they admit that the award was right, and the burden of it must rest where it has fallen. If undertakers desire to cast the responsibility of an indemnity upon their sub-contractors, they must provide for it in their sub-contracts. It follows that in my opinion this appeal ought to be dismissed with costs.

Lord DAVEY: My Lords. It is difficult to come to any conclusion on the subject of this appeal which is not open to criticism, and I can only say that I think that the conclusion to which I have come is less open to criticism than the opposite one. There are three words used in the Act—

"employer," "undertaker," and "contractor"—and your Lordships are called upon to define the relative meaning in which these words are used. Three conditions are necessary under sec. 1 to give the workman a right to compensation—(1) that the employment shall be one to which this Act applies; (2) that the injury has been caused by an accident arising in the course of the employment; (3) that the workman shall be in the employment of the person from whom he claims compensation. Passing by sec. 4 for a moment, I come to sec. 7, sub-sec. 1, which provides that the Act shall apply only to employment by "the undertakers as hereinafter defined," on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined (the words are repeated), on, in, or about any building of a certain character. We have therefore the employments to which the Act applies defined, and a fourth condition is added to those I have mentioned—viz. that the employer must be "the undertaker" as defined in sec. 7, 2. In that sub-section I find that in the case of a building "undertakers" means the "persons undertaking the construction, repair, or demolition." In other words, the undertakers are the persons who undertake. I take the liberty of saying that this is not a definition, but a mere verbal or grammatical synonym, and it affords but little assistance in construing the Act. It seems to come to nothing more than this—that the word "undertakers" in the case of a building is used in its ordinary sense, whatever that may be. It has been decided by the Court of Appeal in *Mason* v. *Dean* (*sup.*) that a person who has contracted with a building owner for part only of the work of construction is an "undertaker" within the meaning of the Act. I think this decision right, for otherwise it appears to me that a workman of such an employer would not get any compensation under the Act at all, and it is quite immaterial for that purpose what the extent or nature of his employer's contract may be, provided that the work on which the injured workman is employed is within the

Act. Indeed, I think that the point is covered by implication, though not expressly, by the decision in *Hoddinott* v. *Newton, Chambers, & Co.* (*sup.*). Persons who undertake a part only of the work of construction are therefore within the definition of undertakers. Nor can I find anything in the definition which requires the undertaking or engagement to be directly with the building owner, or excludes a sub-contractor to whom the contractor for the whole building has let a certain portion of the work. Such a person undertakes the work which he has engaged to do as literally and truly as if his contract was directly with the building owner. Confining myself, therefore, to the definition, and independently of the 4th section, I am of opinion that in the case of a building a sub-contractor may be an undertaker within the meaning of the Act, and consequently a workman employed by him who has been injured by an accident in the course of his employment would be entitled to claim compensation from him. It may be that the so-called definition is so general as to include two persons, each of whom from a different aspect may be the undertaker. Turning now to sec. 4, I regard that section as a proviso on sec. 1; it provides that in a certain case the workman may have a right to compensation from one who is not his employer. It is thereby enacted (in substance) that where "the undertakers as hereinafter defined"—*i.e.* (for the present purpose) persons who have undertaken in whole or in part the construction of any building—contract with another for the execution of any work, the "undertakers"—*i.e.* the said undertakers—shall be liable to pay compensation to a workman employed by the contractor. The words describing the compensation which the undertakers are to pay to the workmen are these: "Any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies." Two cases are therefore contemplated—(1) where compensation is payable

under the Act by the contractor—*i.e.* the sub-contractor; and (2) where it would be payable if he were an employer to whom the Act applies. I omit for clearness of argument compensation independently of the Act. In other words, the language of the section expressly provides for a case in which both the so-called undertakers and the sub-contractor are severally liable under the Act to pay compensation to the workman for the same injury. The section appears to give an additional remedy to the workman, and not to restrict his right under sec. 1. It may be difficult in the case of a building to suggest cases in which a sub-contractor may or may not be an employer to whom the Act applies. It would seem that a sub-contractor who has undertaken part of the work must be one or the other in all cases alike. It is, however, possible that the work undertaken by the sub-contractor might not be an employment within the meaning of the Act. But in the case of a railway, mine, or quarry (where there is a more restricted and special definition of undertakers), it is quite conceivable that a sub-contractor might not be an undertaker or employer to whom the Act applies, and probably in many cases would not be so. The language of the section is, of course, adapted to meet the case of every kind of employment within the Act. I now turn to the proviso on which the question before your Lordships turns: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." The meaning of this proviso is plain. Omit sec. 4, and ask yourself, Is any other person liable? (either under the Act or independently of the Act, I think it must mean). I have already expressed my opinion that, excluding sec. 4 from consideration, a person who has contracted by way of sub-contract to execute work on a building would be liable, and I have pointed out that the language of the section itself contemplates that very case. In the present appeal the liability of the appellants is not questioned. The only question is whether they are entitled to be indemnified by the respondent, and that

question has been argued exclusively on the construction of the Act. For the reasons which I have given I think that the appellants are right. It was argued that the construction of the appellants would oblige the sub-contractor to indemnify the principal contractor, although the accident might have been caused by the default of the latter. I do not think that this consequence would follow, for the reasons stated by the learned counsel for the appellants in his very able argument. I think that sec. 6 would place the ultimate liability on the person in default. I think that the appeal should be allowed, with the usual consequences.

Lord SHAND: My Lords. I agree with those of your Lordships who think that in this case the appeal should be allowed and the judgment of the County Court Judge restored, and I am content to rest my judgment on the reasons which the County Court Judge has himself given. It is almost a hopeless task to attempt to reconcile or to make a consistent whole of the provisions of the Act of 1897 which have a bearing on the question of relief which this action raises, and I do not therefore propose to go into a detailed examination of the clauses containing these provisions. The deceased workman, Brady, was not in the employment of the appellants as a servant of theirs, yet they have been held responsible for compensation for the accident under sec. 4 of the Statute, which makes them "undertakers," in the same way as if the work on the building which they had undertaken to put up in its entirety had been "executed by workmen immediately employed by them," a provision which gives a workman or his representatives greater security for the payment of compensation in case of accident than if they had to rely on the employer alone. Sec. 4 of the Statute concludes with the words: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section;" and the question is whether, under this proviso, the appellants are entitled to the relief claimed. On this question I am of opinion, in the first place, that the respondents, the employers

of the deceased, were themselves undertakers within the meaning of the Act, which provides by sec. 7 that, in the case of a building, that term means "the persons undertaking the construction, repair, or demolition." It is true they were sub-contractors. They were, in my opinion, none the less undertaking the construction of part of the building, the slating, and I agree with the County Court Judge in thinking that this was a substantial part of the construction itself. It is clear the respondent would be an undertaker within the meaning of the Act, if his contract had been direct with the proprietor having the building erected under different contracts, and I do not think that the respondent is the less an undertaker because he was a sub-contractor for the same work, which he actually did, and in the course of which his servant, the workman, was accidentally killed. It follows that, if the action had been originally raised against the respondent alone, he would have been held liable under sec. 1 of the Act. This appears to me to show that the proviso to sec. 7, which gives the right of relief in this case, applies, for the respondent's liability arises independently of that section. It has been said that the use of the word "person" in that proviso must refer to others than persons who were themselves also undertakers under the Act, but I do not read the term as qualified in any way, if only the liability arises independently of sec. 4 itself.

The LORD CHANCELLOR: My Lords. In this case a building was being constructed for Messrs. Barker & Co. by Cooper & Crane, as builders. Cooper & Crane contracted with the respondent Wright to supply slates for the roof, and perform the work of completing the roof. Wright in his turn employed a labourer named Brady to carry the slates, and in the course of that employment a lift broke and caused Brady fatal injuries. It is not denied that under the express language of the Statute Brady's representatives were entitled to compensation from Cooper & Crane. They were the persons constructing the entire building, but they had obtained a sub-contractor to construct the roof. No

question therefore can be raised but that this is an employment to which the Act relates. To get out for the moment of the technical language of the Statute, the substance of the matter would appear to be that Barker was the person for whom the building was being erected. Cooper & Crane were the persons who contracted to build it. Wright was the sub-contractor for the roof, and Brady was employed by Wright, who was Brady's actual employer. Now, it appears to me that the general design of the Statute was to enable an injured workman, or in the event of his death his representative, to make a claim for damages against the employer in the sense of a person who was constructing the building. Even if he was not the immediate employer of the person injured, the theory of the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall be in a certain sense insured against any accident that takes place. It was probably obvious to the Legislature that if the workman were driven to sue a sub-contractor and could not rely upon the responsibility of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or if he did to obtain satisfaction. But then the Legislature seems to have provided that, though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet the theory of the Statute being that the employer was to be made liable, the contractor for the whole work might pursue his indemnity for the liability against the actual employer of the injured workman. Now here, of course, it cannot be denied that Wright is the actual employer, and if the design of the Statute is what I have suggested, it is clear that if Messrs. Cooper & Crane, who did not employ Brady at all, are only made liable by the Statute in the first instance, and the Statute saves their right of indemnity against the real employer, the case is one actually contemplated by the Statute, and so the County Court Judge decided. The

objections appear to be that Wright was not an undertaker at all; that in a popular sense he undertook the construction of the roof is admitted, that he employed Brady is admitted, that the accident happened in the course of Brady's employment under Wright in the construction of the building is also admitted, and the question is whether there is anything in the Statute to show that Wright cannot be within the meaning of the Statute itself as undertaker. The whole point seems to turn upon the question whether the persons who are described as undertakers must be undertakers of the whole construction, and I suppose that the argument turns upon the word "the," because the interpretation section enacts that in the case of a building the undertaker means the person undertaking the construction, repair, or demolition. If by that is meant that in order to be an undertaker the person must have undertaken the construction of the entire building, it would be an intelligible construction, though it is not the one that I should place upon the section. But if, as the Court of Appeal seems to have held, an undertaker does include a person who sub-contracts for a substantial part of a building, then I do not understand why in this case Wright was not an undertaker by any of the ordinary particulars by which an undertaker can be described. Wright was certainly an undertaker. He undertook a substantial part of the work—namely, the roof. He had the control and management of that part of the work. He employed Brady as a labourer in that form of employment, and I do not understand why it is suggested that he was not an undertaker, unless it is suggested that in order to be an undertaker he must take upon himself the entire contract that has been made by another person. It seems to me that this would be an unreasonable construction of the Statute, which in its language is sufficiently clear. To apply therefore the language of the Statute itself to the facts of this case, the employment here of Cooper & Crane was an undertaking by them, and they are in their turn undertakers. But they contracted with Wright for the execution of certain work—namely, the

roof. But by the language of the Statute they are made liable if such work were executed by workmen not immediately employed by them, but on the work for which they contracted. They must pay compensation under the Act to those workmen in respect of any accident arising out of and in the course of such employment. That is the liability imposed upon Cooper & Crane, nor have they denied their liability, nor appealed against the judgment. But while providing that the building contractors shall be liable, the section goes on to provide that they are entitled to be indemnified by any other person who would have been liable independently of that section. Observe that it is not independent of the Statute, but of the section. Whether the enactment is felicitously worded or not, when one looks at the section and the proviso together, I think that it can hardly be doubted that the meaning of it was that where part of the work is let out, although the builder of the entire structure shall in the first instance be liable for injury to the workmen employed by the sub-contractor, nevertheless he is not the actual employer, and the builders, who are thus made liable for injuries to a workman not employed by them shall have a right of indemnity against the actual employer, between whom and themselves there was no relation except that of contractors. I doubt whether the attempted definition of the word undertaker has added anything to the interpretation of the Statute. Cooper & Crane undertook the whole building. Wright undertook the construction of the roof. It is in the course of the construction of the roof that Wright's labourer is injured, and if it is contended that the words of sec. 4 do not apply, this consequence would follow, that Wright, apart from that section, would not be liable to Brady, although Brady was employed by him and was engaged in a building operation; and, if the argument is right, inasmuch as apart from that section Cooper & Crane would not be liable at all, the workman would have no remedy whatever; so that, though Wright should be employing a man in a trade considered dangerous

by the Act, and though in the course of that employment Wright's labourer was injured, the labourer would have no remedy. It seems to me that this would reduce the legislation to an absurdity, and I cannot think that the Legislature could have intended such a result. Put this case. Suppose there was no one who undertook the construction of the whole building. The owner is not in any sense the undertaker. The different contractors undertook to construct each a different substantial part of one building; there would be no person who undertook the whole building. Then suppose this very accident occurs. Who is liable? No one, if the objection is a good one; and yet one of the contractors would be an employer of a man who by this hypothesis is engaged in a work which the Statute has regarded as dangerous; yet he would have no remedy. I think this cannot have been intended. I am not quite certain what is meant by Lord Brampton when he uses the phrase "the building owner." I do not understand whether he means a person who means to have a building built for him or a person who himself undertakes the actual construction. I agree that the Act does not apply to a man who takes no such part at all, but by four or five different contracts places out the building to four or five different builders. If he did this, there would be no undertaker and no compensation. This seems to me to show that, looking at the whole purview of the section in question, it cannot have been intended. In these circumstances I think the judgment of the Court of Appeal wrong, and I move that it be reversed.

Judgment appealed from reversed.

Solicitors for the appellants, *Mason, Edwards, & Mason,* for *R. H. Beaumont,* Nottingham; for the respondent, *Mackrell, Maton, Godlee, & Quincey.*

Also reported in (1902) A. C. 302; 71 L. J. K. B. 642; 86 L. T. 776; 18 T. L. R. 622.

April 29, 1902.

WRIGLEY *v.* WHITTAKER & SONS.

Before Earl of HALSBURY, L.C., Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.

86 *L. T.* 775.

Undertaker—Occupier—Factory.—SEC. 7, 2.

Employment on a factory means on the factory of which the employer is the occupier.

Francis v. *Turner* ([1900] 2 W. C. C. 61) affirmed.

THIS was an appeal from a judgment of the Court of Appeal (reported upon another point [1901] 3 W. C. C. 61) dismissing an appeal by Sarah Ann Wrigley against an award made by the Judge of the Oldham County Court.

This appeal was from the order only so far as it concerned Whittakers.

The appellant was the widow and administratrix of Joseph Wrigley, an operative millwright, who was in the employ of Whittakers.

At the time of the accident Whittakers were repairing the engine at a factory or mill in the occupation of Bagley & Wright.

The respondents, by their answer, denied their liability, on the ground that the employment of Wrigley was not an employment to which the Act applied. At the hearing the following facts were admitted or proved: That the respondents were engaged in fixing a new driving-wheel (or fly-wheel) to the engine which turned the machinery; that the work was being done under a written contract, which provided that Bagley & Wright were to furnish the unskilled labour, whilst the skilled labour and the lifting tackle and the wheel itself were to be furnished by Whittakers; that blocks were used for the purpose of fixing the said wheel—a three-sheafed block was fixed to the ceiling, and another three-sheafed

block was fixed to the portion of the wheel to be lifted, the lifting being performed by means of pulleys attached to a double-handed winch, of which the handles were turned by hand.

The County Court Judge found that the pulleys and winch did not constitute "machinery driven by steam, water, or other mechanical power" within sec. 7, sub-sec. 2, of the Act, being of opinion that the driving power in this case was hand power and not mechanical, and directed an award to be entered in favour of the respondents.

The Court of Appeal affirmed the award, and also held that the respondents were not liable as "undertakers" in respect of the "factory" in which the accident took place.

This latter point was not argued, as it was admitted that it was governed by the decision of the Court of Appeal in the case of *Francis* v. *Turner Brothers* (*sup.*), from which this was in fact an appeal.

Asquith, K.C., *J. Montefiore*, and *Clement Edwards* appeared for the appellant.

Cripps, K.C., and *F. H. Mellor*, who appeared for the respondents, were not called upon.

The LORD CHANCELLOR: My Lords. After hearing the arguments that have been addressed to your Lordships, I must say there seems to me to be no ground for this appeal. The thing done was done not in a factory at all. When I say "not in a factory at all," the place where the thing happened was, it is true, a factory for some other purposes, but not a factory within the meaning of these words, which I think obviously mean a factory where the original employers of the man were manufacturing—in this case big iron wheels. If the accident had happened there, I agree that there would no doubt have been a liability, but in this case there was nothing of the sort. The act of manufacturing the wheel was complete and past. The wheel, when completed, was sent somewhere else. I will assume for this purpose (though I am sure I do not know whether it is the fact or not) that the place to which the wheel was sent was a factory; but

it was a factory in another sense, and to say that you can put those two things together seems to me to be absolutely absurd. The thing that was being done was what is described as fitting the wheel to a cotton-mill where the persons who were to pay for it wanted to have it put. Something was done there by a person sent by the original manufacturers, entirely away from their own place of manufacture, and an accident happened. I am wholly unable to put those two propositions together so as to make it possible to argue that thereupon there was an accident happening in the course of the employment in or about the factory, which was for the manufacture of iron wheels. I need not say any more about the case. It seems to me that the appeal is absolutely unarguable, and I move your Lordships that it be dismissed.

The HOUSE concurred.

Solicitors for the appellants, *Mills, Lockyer, & Mills;* for the respondents, *R. B. Wheatley, Son, & Daniel,* for *Cobbett, Wheeler, & Cobbett,* Manchester.

Also reported in (1902) A. C. 299; 71 L. J. K. B. 600; 86 L. T. 775; 50 W. R. 656; 66 J. P. 420; 18 T. L. R. 559.

November 18, 1901.

BARTELL *v.* GRAY & COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 658.

Undertaker—Occupier—Dock.—SEC. 7, 2.

A firm had, by their workmen, possession of a ship in a dock so far as was necessary to do the painting and plumbing required.

Held, that, although some of the crew were on board in charge of the ship, there was evidence that the firm were the occupiers of the ship, and therefore of the dock.

THIS was an appeal from an award made by the Judge of the Bow County Court in favour of the applicant.

The following facts appeared from the evidence:—

A steamship was lying at a wharf in the Royal Albert Dock, where she was undergoing repairs and being fitted out to carry troops. The shipowners were in charge of the ship, with part of the crew on board.

The respondents were contractors for the painting and plumbing required by the line of vessels of which this was one, and had contracted for the work to be done on that vessel. For this purpose they did not hire any part of the dock, and did not take the vessel out of dock. They were told by the shipping company where the ship was, and went on board, and sent men and materials into the dock to do the work.

At the time of the accident they were doing the painting and plumbing work, and were in possession of the steamship as far as was necessary for the work to be done.

The applicant was in the employ of the respondents, and was engaged in painting the ship when he was injured.

The County Court Judge made an award in favour of the applicant.

The respondents appealed.

Arthur Powell, for the respondents, cited *Raine* v. *Jobson* ([1901] 3 W. C. C. 135), *Merrill* v. *Wilson* ([1901] 3 W. C. C. 155).

Ruegg, K.C., and *Chester Jones* for the applicant.

COLLINS, M.R.: I am of opinion that this appeal must be dismissed. The County Court Judge has arrived at certain conclusions in point of fact: (1) That the applicant was injured while at work in a factory; and (2) that the respondents were undertakers within the meaning of sec. 7. It is said that there was no evidence on which the Judge could find that the respondents were occupiers of a factory, or that he could only have arrived at that finding through a misdirection. Thus, the questions for us are two: (1) Was there evidence that the place where the applicant met with the accident was a factory? (2) Was there evidence that the respondents were occupiers of a factory? It is not for

us to disturb the findings of the County Court Judge if there is evidence to support them. The facts are that a transport was being repaired and made ready for a voyage. The respondents were described as "doing the painting and plumbing work." One of their own men who was called as a witness says that they were "contractors for the line for painting and plumbing." That points to a contract on a large scale. The applicant at the time of the accident was painting a particular part of the ship called the booby hatch, but there is nothing to show that the contract was confined to painting the booby hatch. It was merely a particular part of the work to be done under a general contract to paint the ship. The ship was lying in a dock. She was occupying part of a dock; and therefore the persons in possession of the ship would be the occupiers of a dock or part thereof. The case of *Raine* v. *Jobson* (*sup.*) decided that, so far as concerns a man working on a ship, if the ship is in a dock, the dock being a factory, the ship is in a factory, and therefore a man working on the ship is working in a factory. There can be no doubt, therefore, that the applicant was injured while at work "in a factory." Then, were the respondents "undertakers"? That depends on whether they were persons "having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof." They were painting a ship in a dock. No one could carry on such an occupation without having the use of the dock. Where persons have taken a contract to paint a ship in a dock, and are engaged in the course of that operation, there is abundant evidence that for that purpose they have the use of the dock. It was suggested in argument for the respondents that there could not be an actual use or occupation unless the use or occupation was exclusive. That argument was overruled in *Merrill* v. *Wilson* (*sup.*). When dealing with user or occupation of a thing it is necessary to consider the nature of the thing. Where the subject-matter of the user or occupation is a dock or wharf, it is clear that user or occupation in relation to it may be

different from user or occupation in relation to other subject-matters. The user or occupation of a dock for a special object is not incompatible with the user or occupation of the dock by others for purposes not inconsistent with that special object. Where other persons have to come and go to or from the dock, their user of the dock does not preclude user by others for other purposes such as loading or unloading. This cuts the ground from under the feet of the respondents, for on similar reasons the presence of others on the ship does not displace the occupation of the respondents. No doubt the place which they occupy and where the man was injured must be a factory, and a factory cannot be divorced from all limits and dimensions of space. But here the factory is the whole ship handed over for a special object not inconsistent with the use of the ship for general purposes not incompatible with the special object. There is abundant evidence on which this holding may be supported. It would give rise to a curious anomaly to say that a man if employed directly by the owners would be entitled to receive compensation, but if employed by another person, who did the whole work, would have no right to compensation. Nothing but an over-refined construction of the Act would admit the one case and exclude the other. The result is that the applicant was injured while at work in the employment of undertakers in occupation of a factory, and this appeal therefore fails.

STIRLING, L.J.: As has been said by the Master of the Rolls, there are two questions in this case: First, whether the ship is to be regarded as a factory; secondly, whether the respondents are undertakers. Now, as to the first question, after the case of *Raine* v. *Jobson* (*sup.*), I do not feel any difficulty. A dock is a factory; a ship in a dock is in a factory; and an accident on a ship in a dock is an accident in a factory. No doubt the Act does not deal with relations between shipowners and sailors, but it does not follow that, because a ship is in a dock and work is being done upon her there, the immunity which the ship would have upon the high seas continues when she comes into dock.

When the ship is in dock the liability attaches, and it is not necessary that the shipowner should be in actual possession of the dock, for it matters not whether the respondents had hired the dock or a berth in the dock. It is sufficient if they were in the actual use or occupation of premises within the dock or forming part of it. It seems to me, therefore, that the ship in this case is within the definition of a factory. Upon the second question, whether the respondents were undertakers, I confess that during the argument I felt very considerable difficulty; but after all it comes to this—was there evidence on which the County Court Judge might properly find that the respondents were persons having the actual use or occupation of part of a dock? They were doing painting and plumbing work on the ship preparatory to her being sent on a voyage. They had sent the workman on to the ship to do the work, and one of their witnesses states that they were in possession of the ship so far as was necessary for the work to be done. The shipowners were in charge of the ship for other purposes; but it seems to me that on this evidence the learned Judge might come to the conclusion that the respondents had such an occupation as might make them users or occupiers of the whole ship.

MATHEW, L.J.: I agree. This ship occupied part of the dock. There was evidence to justify the finding that the use of the ship had been handed over to the respondents for the purposes of painting and plumbing work. It is argued for the respondents that exclusive occupation of the ship by them was necessary to entitle the applicant to compensation, and that they cannot be said to have had such occupation, because the ship was in the possession of the owners in the ordinary way. Take the case of a ship that is chartered. What is the position of the charterer? May not he be said to have the use or occupation of the ship? If the ship is handed over to a firm of stevedores for the purpose of unloading and discharging cargo, may not the stevedores be said to have the actual use or occupation of the ship? It is said that that is not this case; but it seems

to me to show clearly that one person may have an independent occupation of a ship which is in the possession of others. We have to construe an Act of Parliament, and we must assume that the Legislature was aware of the ordinary course of business and the mode of dealing with ships, and to know that a ship is a freight-earning machine, and that it is indispensable to the owners for the purposes of their business that they should enter into contracts for the repair of their ships so as to keep them in a condition to earn freight, and that such contracts may involve the handing over of the ship to different firms of contractors for such and similar purposes. These contracts are ancillary to the main purpose of the shipowners, which is to earn the freight. If an accident occurs in the course of performing them the shipowners are not liable. Then is anybody liable? It is argued for the respondents that persons injured in the course of employment under such contracts have no remedy; but why should the Legislature be held to have intended that men at work upon a ship should be excluded from the benefits of the Act if they happen to be employed by sub-contractors? It is said that the Legislature has enacted that the workman shall not recover unless employed by persons having actual use or occupation of the ship, and that the persons in possession of the ship for the purposes of such contracts are not in occupation. Is an engineer repairing machinery not in occupation of the ship? To give another instance, is a coal merchant filling the bunkers not in occupation? The truth is that the possession or occupation of all such persons follows from the possession or occupation of the owners; and, without a clear indication of a contrary intention, it must be taken that such persons are in actual use or occupation of the ship.

Appeal dismissed.

Solicitors for the appellants, *Hurd & Son;* for the respondent, *Shaen, Roscoe, Massey, & Co.*

Also reported in (1902) 1 K. B. 225; 71 L. J. K. B. 115; 85 L. T. 658; 50 W. R. 310; 66 J. P. 308.

November 13, 1901.

EVANS *v.* PENWYLLT DINAS SILICA BRICK COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 58.

Workman—Independent Contractor.—SEC. 7, 2.

A quarryman was employed under a written agreement that he should be paid a certain sum per ton of material worked, his employers supplying the necessary tools. He engaged and discharged men to work under him. He determined his employment, but resumed it again upon his employers assuring him that he should be compensated in case he was injured by accident.

Held, that there was evidence that he was a workman within the Act, and not an independent contractor.

THIS was an appeal from an award of the Judge of the Brecknock County Court.

The applicant for compensation was a quarryman who was employed by the employers under a written agreement on the terms that he should be paid so much for every ton of material which he worked. His tools were found for him, and he used to hire the men who worked under him and discharge them. Being in doubt as to his position with regard to the Act, he gave notice to terminate his employment, and then had a conversation with the employers' manager, in which the latter said he would see that the applicant was compensated in case of accident. He thereupon resumed his employment. In the course of his work he sustained injuries.

The employers contended that the applicant was not a workman, but a contractor.

The County Court Judge found as a fact that he was a workman.

The employers appealed.

Simmons v. *Faulds* ([1901] 3 W. C. C. 169) was cited.

Ruegg, K.C., and *Arthur Lewis* for the employers; *S. T. Evans*, K.C., and *Rhys Williams* for the applicant.

The COURT dismissed the appeal.

COLLINS, M.R., said that the County Court Judge had found as a fact that the applicant was a workman, and unless it could be made out that there was no evidence to support that finding, the award must stand. It was contended that the applicant was a sub-contractor and not a workman. In his opinion it was difficult to distinguish the position of this man from that of an ordinary labourer at piecework. Having regard to the very wide definition of "workman" given in the Act, he thought there was evidence justifying the finding. But that was not all. Having a misgiving as to whether he was within the Act, he gave notice to determine his employment, and took the opportunity of stipulating that he should be entitled to compensation in the event of an accident, and then proceeded to work on those terms. That certainly went to show that he was a workman within the Act. The appeal must, therefore, be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

Solicitors: *W. Hurd & Son*, for *Gwilym James, Charles, & Davies*, Merthyr Tydvil, for the employers; *Sharpe, Parker, & Co.*, for *Cuthbertson & Powell*, Neath, for the applicant.

June 5, 1902.

DUNHAM *v.* CLARE.

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

66 *L. T.* 751.

Cause of Death—Natural and Probable Consequence of Injury.—

SEC. 7, 2; SCHED. I. 1 (*a*).

Where death results from the injury dependants can recover, although death may not have been the natural or probable consequence of the injury.

THIS was an appeal by the applicant from the award of the County Court Judge at Walsall.

The applicant was the widow of the deceased workman.

On September 2, 1901, the workman was engaged in carrying a heavy pipe up some steps when the pipe fell upon his foot and injured one of his toes. He attended a hospital as an out-patient until September 16, when erysipelas supervened, and he was ordered to bed by his doctor, and died on September 27.

The doctor who attended him stated that erysipelas started from the wound in the foot; that it was phlegminous erysipelas, which was an uncommon form; that the cause of death was blood poisoning caused by erysipelas in the wound; that erysipelas was not a necessary result of a wound of that kind, but was very unusual; that erysipelas is due to germs which enter from without; that, with a wound properly dressed and kept, erysipelas would be theoretically impossible; that, in case of a wound not being kept open, he would expect erysipelas in less than ten days, if at all; that, if erysipelas started more than fifteen days from the date of a wound, he would expect that the wound had been reopened.

A doctor, who gave evidence on behalf of the respondent, stated that erysipelas was a very unusual consequence of a wound such as that received by the deceased workman; that erysipelas was caused by the introduction of germs only; that, if the germs were introduced when the wound was caused, he would expect erysipelas to come out in six days at the most.

The County Court Judge's decision was as follows: "I find and award that applicant is not entitled to compensation on ground that death not result of accident—*i.e.*, not natural or probable consequence."

The applicant appealed.

Ruegg, K.C., and *R. J. Lawrence*, for the appellant, cited *Lloyd* v. *Sugg & Co.*, ([1900] 2 W. C. C. 5), *Thompson* v. *Ashington Coal Company* ([1901] 3 W. C. C. 21).

Disturnal for the respondent: The evidence of the doctors showed that the erysipelas was not the result of the injury received by accident, but must have been set up by some

new intervening cause, probably some careless conduct on the part of the workman. The injury was not, therefore, the proximate cause of the death. The death must be the natural and probable consequence of the injury by accident. He cited *Clark* v. *Chambers* (3 Q. B. D. 327), *Sharp* v. *Powell* (L. R. 7 C. P. 253), *Pink* v. *Fleming* (25 Q. B. D. 396), *Winspear* v. *Accident Insurance Company* (6 Q. B. D. 42). Under this Act the proximate cause of the injury is alone to be considered.

COLLINS, M.R.: I am not satisfied that in this case the County Court Judge did not misdirect himself as to the law. In his award he says: "I find and award that applicant is not entitled to compensation on ground that death not result of accident—*i.e.* not natural or probable consequence." Accepting his view that at the time of the accident it would have been unreasonable and unnatural to expect that erysipelas and death would follow, the question arises whether that is the right standard to apply in measuring the liability of an employer under the Act. Now, it is not denied that the workman was injured by an accident arising out of and in the course of his employment. It is incumbent upon the applicant for compensation to show that there was an accident which caused injury, and that death resulted from that injury. When the applicant has shown that, he has done all that is necessary to establish the claim to compensation. It is a question of fact whether the death did result from the injury caused by the accident. If it did, then it does not matter how improbable or unnatural it might have appeared that death should result. The only material question is whether there has been any break in the chain of causation, whether any new act has intervened between the injury by accident and the subsequent death. It therefore seems to me that, in dealing with the obligation to pay compensation under the Act, we must not treat the case as being the same as a case of breach of contract, or of ordinary tort. This Act of Parliament has imposed a liability to pay compensation quite independent of any question of contract or negligence. The

employer is liable for injury by accident. If there is an accident, the only question is whether the alleged injury is the result of the accident. In my opinion the County Court Judge has, in the present case, laid down the wrong standard, that the death must be the natural and probable consequence of the accident. Although death might not be a natural and probable consequence of the accident, yet it might be caused by the accident without any new act intervening to break the chain of causation. The County Court Judge misdirected himself, and therefore this case must go back to him to be heard again.

MATHEW, L.J.: I am of the same opinion. The employer contended that the death was not the result of the injury by accident, but was due to a wholly independent cause. He alleged that the workman behaved in a wholly unreasonable manner after he had been injured by the accident, and thereby aggravated the consequences of that injury, and brought about his own death. We cannot say, upon the evidence, that the workman acted unreasonably at all in the matter. That cannot be made out upon the evidence before us. I agree that the County Court Judge misdirected himself, because the death may well have been the result of the injury by accident although it was not a natural and probable consequence of the accident.

COZENS-HARDY, L.J.: I agree. Although it might be most improbable that death resulted from the accident, yet it might in fact have been the consequence of the accident. The question under the Act is: From what did death in fact result? That is not to be ascertained simply by considering what might reasonably and naturally be expected to result from the accident, but from what in fact happened.

Appeal allowed.

Solicitors for the appellant, *Rowcliffes, Rawle, & Co.*, for *J. F. Addison*, Walsall; for the respondent, *Robinson & Bradley*, for *C. A. Loxton & Newman*, Walsall.

Also reported in (1902) 2 K. B. 292; 71 L. J. K. B. 683; 66 L. T. 751; 50 W. R. 596; 18 T. L. R. 645.

November 8, 1901.

HOWELLS *v.* VIVIAN AND SONS.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 529.

Dependent.—SEC. 7, 2.

The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon them as part of their income or means of living.

Main Colliery Company v. *Davies* ([1900] 2 W. C. C. 108) considered.*

THIS was an appeal by the applicant from the award of the County Court Judge at Neath.

The applicant was the father of a deceased workman who was a collier, aged twenty-seven, was unmarried, and lived with his parents and a married sister.

The applicant claimed compensation as being in part dependent upon the earnings of the deceased at the time of his death.

The evidence was as follows: The deceased workman lived with his father and mother and a married sister; his average wages were 25*s.* a week, the whole of which he paid to his parents every week; they kept him in everything and gave him weekly pocket-money, and that he cost them about 14*s.* a week; they had the difference of his wages, and spent it on their keep; the father was earning 33*s.* 9*d.* a week; the mother had been in bad health for twenty years, and could do no work; and the married daughter did the work instead of a servant.

The County Court Judge, in giving his decision, said: "In this case the applicant, William Howells, asks for compensation for the death of his son, who was killed while in the

* The Master of the Rolls appears to have said that, "The judgment of the House of Lords seemed to preclude them from laying down any definite standard by which to test dependency." (See 18 T. L. R. 36.)

respondents' employ. The facts, I find, were that the applicant is an able-bodied workman earning the usual full wages of a person in his position of life, and who has brought up and maintained himself and his family upon those wages, and at the time of the death of his son had no one except himself and his wife to maintain. The son was a man of twenty-seven years of age, was unmarried, and earned about 25*s.* a week, lived at home with his father and mother, to the latter of whom he gave all his wages, and she found him in lodging, food, clothes, and pocket-money. I am asked under these circumstances to say that the applicant was 'dependent,' or 'in part dependent,' on his son, because as a fact the son gave his mother his wages. I take it a 'dependant,' or 'part dependant,' is a person who from some cause is unable to support himself and his family without assistance from some other source, and on which he may be said then to be dependent. How can I say in this case that this able-bodied workman, earning about £1 13*s.* 9*d.* a week, with only himself and wife to maintain, is unable to support himself without assistance? I cannot find that the applicant was dependent, so I must find in fact that he was not dependent on his son."

The applicant appealed.

S. T. Evans, K.C., and *Ivor Bowen* for the appellant.

Ruegg, K.C., and *Anton Bertram* for the respondents.

COLLINS, M.R.: I have felt some difficulty with regard to the decision in *Main Colliery Company* v. *Davies* ([1900] 2 W. C. C. 108). It seems to me to be difficult to approach the question of dependency, as a matter of law, without taking some standard of living as a guide. There must be some standard with regard to the class of persons with whom the Act deals, and their comfortable maintenance. This case is, however, I think, clear of all those difficulties, because the Judge has stated a proposition of law which he laid down as applicable to the present case. (The learned Judge read the decision above set out.) There is made the standard, whether the alleged dependant can support life

without the money which he has lost by the death of his son. That seems to me to be directly contrary to the rule laid down in the House of Lords in *Main Colliery Company* v. *Davies* (*sup.*). I think that some guidance is to be found in the judgment of Lord Davey in that case, where he says: "I think the learned County Court Judge puts the case extremely well. 'I think it is clear,' he says, 'that as the boy did give his parents his wages, and the parents did receive and depend on the son's wages as part of their income or means of living, the question is answered.' Observe the County Court Judge says, 'as part of their income or means of living,' by which I understand him to mean their actual income or means of living. I agree with my noble and learned friend on the Woolsack that that is a much more satisfactory way of construing this Act—to look at their actual income and actual expenditure rather than to introduce some vague and uncertain standard which it is impossible to lay down with precision." In this case, was the sum contributed by the son received by the father as a part of his income or means of living? It is obvious that it was. The learned Judge has rejected that consideration, and has held that there was no dependency if the family could subsist without the assistance of the wages of the deceased. It seems to me that the reasons which he has given do apply a standard which is contrary to the principle laid down in the House of Lords, and that, therefore, this is not a case in which the question is whether there was any evidence to support his finding, but is a case in which he has not taken an accurate view of the law, and the misdirection is not immaterial to the result. The result is that this case must go back to the County Court Judge

STIRLING, L.J., agreed.

MATHEW, L.J.: I am of the same opinion. The County Court Judge seems to have laid down a rule of law which excluded from consideration the question whether the wages of the deceased were part of the income or means of living of the family, because the whole family could be maintained

without those wages. It never was intended that the County Court Judge should in every case inquire critically into the standard of living, and say whether with the earnings of the deceased workman the family was above or below that standard. I agree that it is not decisive of the question of dependency that the deceased workman did contribute to the family fund, or, on the other hand, that the father could support the family without that contribution.

Appeal allowed.

Solicitors for the appellant, *H. P. Becher*, for *Vaizie Simons*, Pontypridd; for the respondents, *Sharpe, Parker, & Co.*, for *Cuthbertson & Powell*, Neath.

Also reported 85 L. T. 529; 50 W. R. 163; 18 T. L. R. 36.

November 13, 1901

O'KEEFE *v.* LOVATT.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 57.

Compensation—Dependants—Payments to Deceased.—SCHED. I. 1 (*a*) (i.)

Dependants are entitled to compensation, although the deceased may have been in the receipt of weekly payments under the Act.

THIS was an appeal from the decision of the Deputy-Judge of the Marylebone County Court.

The workman in this case was injured by an accident. He made a claim for compensation, and an award was made for a weekly payment of 15*s*. Weekly payments were made under the award until the workman died. He had then received £64 10*s*. His mother and stepfather then applied for compensation.

When the case came on for hearing, the Deputy-Judge said that the matter had been disposed of by the award, and that he had no jurisdiction to entertain it any further.

The applicants appealed.

Ruegg, K.C., and *W. M. Thompson* for the applicants; *F. Low* for the employer.

The COURT allowed the appeal, holding that the applicants were entitled to ask for compensation, notwithstanding the previous award.

Solicitors for the applicants, *Buchanan & Hurd;* for the employer, *Mackrell & Co.*

November 5, 1901.

BEVAN *v.* CRAWSHAY BROTHERS (CYFARTHA) LIMITED.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 496.

Compensation—Part Dependants—Funeral Expenses.—SCHED. I. 1 (*a*)(ii.).

In assessing compensation payable to part dependants, the expenses of the deceased's funeral may be taken into consideration.

Appearance of parties in an arbitration discussed.

THIS was an appeal by the respondents from the award of the County Court Judge at Merthyr Tydvil.

The applicant was the mother of a deceased workman, and she claimed compensation as a part dependant.

The father had made a formal claim for compensation as being in part dependent upon the earnings of his son, and subsequently deserted his wife, and was not heard of any more. It was stated that he died after the making of the award.

The mother then filed a request for arbitration.

The County Court Judge found that the applicant was in part dependent upon the earnings of her son, and in assessing the compensation he awarded the sum of 3*s.* a week for a period of three years, and also the sum of £6 8*s.* for the

funeral expenses of the deceased, the total amount awarded being £29 4*s*.

The respondents appealed.

B. Francis Williams, K.C., and *S. T. Evans*, K.C., for the appellants; *W. Denman Benson* for the respondent.

COLLINS, M.R.: The deceased workman in this case was the son of persons who survived him, and he had a brother and a sister. The father made a claim for compensation for the death of his son, but he did not pursue his claim beyond a certain point. The claim for compensation was continued by the mother, who made a request for arbitration. Three points were taken on behalf of the respondents. The first point taken was that it was not competent for the County Court Judge to deal with the claim at all in the absence of the father. Now, the father had deserted his wife and family, and is stated to be now dead. The County Court Judge, having heard and considered all the facts, decided that the mother was a dependant upon the earnings of the deceased, and assessed compensation upon that footing. It is now said that all the proceedings were null and void because the father was not made a party thereto. No doubt there are provisions in the rules as to parties, but I do not think that they are so imperative as is contended by the respondents in the present case. The provisions as to parties are contained in Rule 2 (1). I doubt whether the presence of the father was necessary under the circumstances, and whether the Judge was not entitled to deal with the matter in his absence; but, further, this point was not properly taken at the hearing, and does not appear upon the Judge's notes. Certainly no injustice has been done to any one by the fact that the father was not a party to the proceedings. So much, then, for the first point. The second point taken was that the mother was not a "dependant." That is a question of fact, and there was evidence upon which the Judge could find as he did. The last, and only substantial, point taken was that the Judge in this case has given a sum to the applicant for funeral expenses, or has mentioned those expenses as being

a factor in his assessment of the compensation payable to the applicant. It is contended that he exceeded his jurisdiction in so doing. The provisions of Sched. I., para. 1 (*a*) (ii.), are relied upon in support of that contention. It provides that, "If the workman does not leave any such dependants, but leave any dependants in part dependent upon his earnings at the time of his death, such sum . . . as may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants" may be awarded as compensation. It is said that those words are not distinguishable from the language of Lord Campbell's Act (9 & 10 Vict. c. 93), under which it has been decided that funeral expenses are not "injury resulting from the death" within the meaning of sec. 2. I think, however, that in this Act we must look at the whole of the three sub-secs. of para. 1 (*a*) together, and then we find that they are not wholly silent as to funeral expenses as in the case of Lord Campbell's Act. Sub.-sec. (iii.) provides that, "If he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds," may be awarded as compensation. That assumes that funeral expenses would have to be paid when there are no dependants, and that the person who paid those expenses should be reimbursed. Why? Because those expenses are "injury" by reason of the death of the workman within the meaning of the Act. This Act itself, therefore, shows that funeral expenses are a subject-matter of compensation under the Act, and therefore there is nothing in the Act itself to eliminate those expenses as a factor in the assessment, within the maximum limit, of the amount of compensation which ought to be paid. It seems to me that it may be a very material matter for consideration that, out of the compensation awarded, the funeral expenses would have to be paid. I think that the Judge was perfectly right in taking the funeral expenses into consideration. This appeal, therefore, fails upon all points, and must be dismissed.

STIRLING, L.J.: I am of the same opinion. Three points

have been taken by the appellants. The first point taken was that the proper persons were not parties to the proceedings before the County Court Judge. It is provided by Rule 2 that all persons whose presence is necessary to enable the Judge to effectively and completely adjudicate upon and settle all the questions involved shall be made parties; and it is further provided, by Rule 4, that, if there is no legal personal representative, the application shall be made by the dependants themselves, and that, if there is a conflict of interest between dependants, the application may be made by some of the dependants, the other dependants being made respondents. That rule was not followed in the proceedings before the County Court Judge. There were other persons who were dependants at the time of the death of the workman, and, if any substantial injustice had been done by reason of the absence of those parties, I do not say that it might not be proper to remedy that injustice and to direct the matter to be reheard. These rules are directed to the course of the procedure in the County Court, and I rest my judgment upon this point, that the objection was not taken before the County Court Judge, that the proper procedure had not been followed. The second point taken was that the mother was not a "dependant" within the Act. That is a question of fact, and there was evidence upon which the County Court Judge might properly find that the mother was a "dependant." The third question which arises on this appeal is that the County Court Judge has included, as part of the compensation which he has awarded, the funeral expenses of the deceased workman. It is contended that he had no power to do so in such a case as this. It is argued that funeral expenses can only be given as compensation when there are no dependants, and that in this case there are dependants. I cannot agree with that view of the Act. In a case like the present the Act prescribes that the amount of compensation shall be such sum as may be determined to be "reasonable and proportionate to the injury to the said dependants." Now, the death of this workman put the

dependants to the expense of his funeral, and, if the matter were *res integra,* and there were no decisions upon the subject, I would say that the funeral expenses were a matter to be taken into consideration in determining the amount of the compensation. Under the similar provisions of Lord Campbell's Act, however, it has been held that compensation cannot be given in respect of funeral expenses. But there is this difference between the two Acts: in Lord Campbell's Act there is no mention at all of funeral expenses, whereas in this Act funeral expenses are expressly mentioned as the subject-matter of compensation when there are no dependants. That being so when there are no dependants, why not when there are dependants? In my opinion it would be unreasonable to construe this Act as excluding funeral expenses from consideration in assessing the amount of compensation. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.: I agree. I think that we should be defeating the object of the Legislature if we did not permit these expenses to be awarded as part of the compensation within the limits prescribed by the Act. The compensation is to be a sum "reasonable and proportionate to the injury." It is clear that the funeral expenses would make the real amount of the compensation so much less if those expenses were excluded from consideration in assessing the amount of compensation.

Appeal dismissed.

Solicitors for the appellants, *Schultz & Sons,* for *Gwilym James, Charles, & Davies,* Merthyr Tydvil; for the respondent, *Ullithorne & Co.,* for *D. W. Jones,* Merthyr Tydvil.

Also reported (1902) 1 K. B. 25; 71 L. J. K. B. 49; 85 L. T. 496; 50 W. R. 98; 18 T. L. R. 17.

November 12, 1901.

PRYCE *v.* PENRIKYBER NAVIGATION COLLIERY COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 477.

Compensation—Dependent—Monies coming to Dependants on Death.—SCHED. I. 1 (*a*) (i. and ii.).

Monies coming to dependants on the death of a workman do not affect the question of whether or not they were dependent upon his earnings at the time of his death.

THIS was an appeal by the respondent from a decision of the Judge of the Aberdare County Court.

The applicant was the widow of a workman who was killed by an accident. At the time of his death the deceased was earning £3 a week. The deceased was also possessed of a sum of money which would pass to the applicant as his administratrix, and by which she would personally benefit to the extent of £100, but the County Court Judge refused to take that matter into consideration, and holding that the applicant was wholly dependent upon her husband's earnings at the time of his death, he awarded her a sum of £300, based solely on the amount of the deceased's earnings. There was no evidence that the sum of money possessed by the deceased produced any income, or that the applicant had any source of maintenance at the time of her husband's death beyond his weekly wages.

The respondents appealed.

Ruegg, K.C., and *Anton Bertram* for the defendants: The County Court Judge ought to have taken the £100 into consideration. The question was whether the applicant was left wholly unprovided for by her husband's death. They referred to *Grand Trunk Railway Company of Canada* v. *Jennings* (13 A. C. 800).

S. T. Evans, K.C., and *W. D. Benson*, for the widow: The case just cited was decided upon the construction of Lord Campbell's Act (9 & 10 Vict. c. 93), and has no application to questions on the construction of this Act. Under that Act damages are at large, while under this Act the amount of compensation is fixed. The deceased might have bequeathed this £100 to some person other than the applicant, and there is no evidence that she received any benefit whatsoever from it in his lifetime. How, then, can she be said to have depended on it in any respect whatever?

COLLINS, M.R.: I am of opinion that this appeal must be dismissed. The deceased workman was earning a sum of £3 per week, and upon his death a certain sum came to his widow as his administratrix. To the extent of £100 out of that sum she will take a personal benefit. Those are the facts of the case. She has applied for compensation, and the question arises whether or not she was "wholly dependent upon his earnings at the time of his death." The County Court Judge has found that she was. It is said that he ought to have taken into consideration the fact that after the workman's death the widow became benefited to the extent of £100. It seems to me that to introduce that into the question is to introduce a matter which the Legislature never contemplated as an element in the question. "At the time of his death" must obviously mean some time during the man's life, because he could not earn anything except during his lifetime. So that the question we have to deal with is whether or not the applicant at the time that her husband died—that is, at the time just antecedent to his death—was wholly dependent upon his earnings. On the facts before us there is no indication whatever that during his lifetime she had any other source of income than his earnings. We must take it, therefore, that at the moment when her husband died she had nothing to depend upon but his earnings. Upon that the Judge has to decide how much, subject to the Act, he will give her. It is not a matter in his discretion, but there is a maximum

named in the schedule to the Act, and as a condition precedent to the widow obtaining that maximum, she must have been wholly dependent upon the deceased's earnings at the time of his death; which I take to mean that there must have been no other source upon which during his lifetime she depended for her livelihood except his earnings. It was suggested that the question to be considered was whether the applicant was in such a position, taking into consideration all the means at her disposal after her husband's death, that one might say, in popular language, that she was not left dependent upon her husband's earnings, because she has other sources of income. That is not the effect of what the Act has said. The suggested interpretation would introduce great difficulties in adjusting a scale of compensation, and that is what the Legislature has deliberately abstained from doing. It has taken that sort of adjustment out of the Judges' hands, and has fixed an arbitrary sum, which may not amount to anything like complete compensation. The reason I say that is, that sub-para. (ii.), which deals with partial dependence, makes it possible for the Judge to give as compensation a sum equal to the maximum which he may give for whole dependence. That shows that the Legislature did not intend to give and did not think that they were giving that which in all circumstances would be anything like a complete compensation for the death of the workman upon whom the applicant was wholly dependent. An arbitrary sum has been given, and one can see reasons why that should be done. The compensation paid on the death of a workman is assessed and paid, not by instalments as in the case of an injured man, but once for all, and it is impossible to say what sort of income may come to the widow of a workman upon his death. The Legislature has therefore thought it better to fix and give her a sort of rough and ready possible equivalent, rather than to leave it to be ascertained how much, under all the circumstances, she ought from time to time to have. It has thought it convenient to give a lump sum down, and thereby to get rid of

all those inquiries, which might be matters of great difficulty, as to what her means of livelihood may be at future times. In the course of the argument cases were put which show the difficulties that would arise if we took the suggested view of the meaning of "wholly dependent." It would be impossible to take into consideration a legacy falling in to the widow perhaps a month after her husband's death. The only logical moment at which the line can be drawn is the moment of the workman's death. Was the widow wholly dependent on her husband's earnings at the time of his death? If so, she is to be compensated under the first part of sub-para. (*a*), but if only partially dependent, then her claim is under the second part. It seems to me that the words of the Act are so clear on this point, that we should ourselves be legislating if we departed from their plain meaning. Therefore I think that the learned County Court Judge in this case was right in arriving at the conclusion that the applicant was wholly dependent on her husband's earnings. I have already said, and I state it again, that in this case there is no evidence that during her husband's lifetime she was deriving any income out of any other fund than his earnings. If the facts were otherwise it might—I do not say it would—make a difference.

STIRLING, L.J.: I agree. Looking at the matter broadly, I think that the point to be considered is whether the "earnings" were the sole source to which the widow could look for maintenance up to and at the time of her husband's death. That being so, it seems to me that in the present case that condition is fulfilled, and that, therefore, the appeal should be dismissed.

MATHEW, L.J.: We are asked to translate the words of this paragraph in Sched. I. into different phraseology, and to say that it means that a widow, for example, shall not be entitled to compensation unless she has been reduced to absolute poverty by her husband's death. That is not what the Act says. Further, it is contended that no provision, or only partial provision, should be made for the widow if any money

comes to her from her deceased husband's estate. There is nothing in the Act to show that. The truth is that the Legislature probably saw that such a case as the present was one most unlikely to arise, and legislated, therefore, for what would be the common case, and it was never contemplated that there should be an inquiry, as in an administration suit, upon the death of a workman as to whether his debts and liabilities absorbed the whole of any small sum of money which he had managed to save. When one goes on to read the following language of the schedule, it is perfectly plain and distinct. The applicant in the present case, at the time of her husband's death, was wholly dependent upon his earnings. What followed his death ought not, as it seems to me, to be taken into account. If anything after that moment of time is to be taken into consideration, why should you not take into account the amount of an insurance on the deceased's life, or a bequest in a will coming to the widow after her husband's death? I do not suppose for a moment that it was intended that there should be any such inquiries. The language of the Act is plain and I agree with my brethren that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the widow, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd; for the company, *H. P. Becher*, for *Simons & Powell*, Pontypridd.

Also reported in (1902) 1 K. B. 221; 71 L. J. K. B. 192; 85 L. T. 477; 50 W. R. 197; 66 J. P. 198.

November 6, 1901.

AYRES *v.* BUCKERIDGE; WHEALE *v.* RHYMNEY; IRON COMPANY; JONES *v.* RHYMNEY IRON COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 472.

Weekly Earnings—Employment less than Two Weeks.—SCHED. I. 1.

Where compensation is payable in respect of an injury to a workman who has worked for the same employer for a period less than two weeks, the weekly earnings upon which the amount of compensation is calculated should be taken to be the hypothetical sum which the workman would, but for the accident, have probably received in the course of a week from the employer in whose service he met with the accident.

THESE three appeals, by the respondent in each case, from decisions of County Court Judges, were heard together.

AYRES *v.* BUCKERIDGE.

This was an appeal from the Brentford County Court.

The applicant was the widow of the deceased workman.

The deceased was a labourer, and had entered into an arrangement with the respondent to work for him eleven hours a day for five days in the week, and for five hours on Saturdays, making altogether sixty hours' work a week. His wages were to be at the rate of 7½*d.* an hour. He was not engaged for any definite period, and was liable to be discharged at one hour's notice. Under this arrangement he worked for four days for eleven hours a day, and then met with the accident which caused his death.

The County Court Judge took the deceased's average weekly earnings at £1 17*s.* 6*d.*—*i.e.* sixty hours at 7½*d.* an hour, and awarded the widow £292 10*s.*—*i.e.*, 156 times £1 17*s.* 6*d.*

The employer appealed.

Atherley Jones, K.C. (*H. Kisch* with him), for the employer,

cited *Lysons* v. *Knowles* ([1901] 3 W. C. C. 1), *Hathaway* v. *Argus Printing Company* ([1901] 3 W. C. C. 177).

Bray, K.C. (*W. M. Thompson* with him), for the widow.

WHEALE *v.* RHYMNEY IRON COMPANY.

This was an appeal from the Tredegar County Court.

The applicant began to work for the respondents on Wednesday, August 29, and he worked every day, including Sunday, up to and including the following Wednesday, when the accident happened. His wages were 5*s.* 2*d.* a day, and, having worked for eight days, he had thus actually earned £2 1*s.* 4*d.*

The County Court Judge was of opinion that his average weekly earnings should be calculated on the basis of his working six days a week at 5*s.* 2*d.* a day, and on this footing assessed the compensation which he awarded.

The respondents appealed.

Ruegg, K.C., and *Anton Bertram* for the respondents, referred to *Illingworth* v. *Walmsley* ([1900] 2 W. C. C. 118) *Cadzow Coal Company* v. *Gaffney* (3 F., 72).

Atherley Jones, K.C., and *R. Vaughan Williams* for the workman.

JONES *v.* RHYMNEY IRON COMPANY.

This was an appeal from the Tredegar County Court.

The applicant was engaged at 5*s.* 2*d.* a day. He commenced work on Tuesday, September 4, and worked every week-day till September 12, when he was injured.

The County Court Judge calculated his wages in the same way as in the preceding case, and awarded compensation accordingly.

The respondents appealed.

Ruegg, K.C., and *Anton Bertram* for the respondents.

Abel Thomas, K.C. (*Lloyd Morgan* with him), for the workman.

COLLINS, M.R.: These three cases raise very nearly if not quite the same point. It was hoped that in *Lysons* v. *Knowles*

(*sup.*) the House of Lords would give some further directions as to the mode of assessing compensation, and hence there has been some delay in hearing these appeals. It has now been ascertained that the House of Lords will not add anything to what they have already decided, and so these cases have now come on for discussion in this Court. *Ayres* v. *Buckeridge*, the first of the three, was an application for compensation made by a dependant of a workman who had been accidentally killed. The circumstances of the case fairly raise the inference which I think the County Court Judge drew that the deceased's employment was to continue from week to week. He lived a considerable distance from the place where he was to work, and special terms were arranged between him and the employer that he was to work sixty hours a week. There is no doubt that his employment was liable to be terminated at one hour's notice, but the terms of the employment were such as to justify the finding of the County Court Judge that he was to be employed for a week. He actually worked only for four days, including the day when the accident happened by which he lost his life. He did not work, in fact, for a complete fortnight, nor even for a complete week, but the House of Lords, in *Lysons* v. *Knowles* (*sup.*), has decided that two weeks actual work are not necessary to entitle an applicant to compensation under this Act. We must, therefore, fall back upon the principles laid down by the House of Lords in that case, and in the absence of the actual fact of two complete weeks in which the deceased had earned, or had the opportunity of earning, wages, we must use the materials at our disposal as best we can to see what amount of compensation ought to be given under the general provisions of the Act. Now, the Act does not pretend to give complete compensation, such as would be given to a plaintiff in an action based on the negligence of the respondent, the amount of damages in such an action being the sum which, in the opinion of the jury, is a fair and complete compensation to the person

injured for the injuries he has sustained. That is not the scheme of this Act. In the first place, it is a cardinal feature in this Act that there need be no negligence at all on the part of the employer in order to entitle the applicant to compensation; and, secondly, a nexus between the person injured and the particular employer is established, and the compensation is measured by the earnings of the injured person in the employment of that particular employer in whose service he was when the accident happened. The problem is to find out what we are justified in supposing those earnings would have been. The Legislature has provided a comparatively easy mode of ascertaining this in cases where the facts admit the taking into consideration an employment extending over a number of weeks, for if the number of weeks during which the man was employed is ascertained, and his earnings divided by that figure, the result will be the average weekly earnings. Now, the question in the first case we have to decide arises under sched. 1, para. 1 (*a*), which provides for the amount of compensation to be paid in cases where death results from the injury. Para. (i.) deals with a case where the workman leaves dependants wholly dependent upon his earnings at the time of his death, and runs as follows: [His Lordship read the paragraph.] The latter part of that paragraph, dealing with a case where the period of the workman's employment by the said employer has been less than three years, is the part which is particularly applicable to the first of the three cases now under appeal. In this case the actual employment was only for four days, and it is therefore impossible to apply in strictness the rule laid down by the Statute by which his "average weekly earnings" are to be multiplied by 156. We cannot find two or more weeks during which he has actually had the opportunity of earning something, and has in fact earned something. But on the principles laid down by the House of Lords in *Lysons* v. *Knowles* (*sup.*) the applicant is nevertheless entitled to compensation, and what we have to decide is how the

compensation is to be assessed. Lord Halsbury, L.C., in that case said: "Then I suppose it occurred to everybody who was dealing with the mode in which the Act was to be administered, and considering how the relief was to be given, that you must in some way or another find out what was to be the weekly payment if it had relation to his earnings or wages." We are therefore relieved from the discussion of the meaning of "average" in the present case, because we have not the facts on which any average could be calculated. We have to say on the materials before us what this man's average weekly earnings would have been. Now, what are those materials? We have the fact that he actually served for four days, and the terms on which he served were that he was to serve a full week. To find what his weekly earnings were for the purpose of assessing compensation I am not hampered by the fact that he did not earn a whole week's wages. That fact is not material. I take the actual facts of the case in order to arrive at a hypothetical sum, because I have not the materials for anything else. To find that hypothetical sum, I look at the terms on which the deceased workman was employed. His employment was for a week at the rate of sixty hours' work in the week. Under these circumstances it seems to me perfectly fair to do as the Judge has done and treat the workman as a person whose standard of wages at the time of his death was at the rate of sixty hours a week at a certain sum per hour. Having taken that sum, the Judge has multiplied it by 156, as directed in para. 1 (*a*) (i.) of Sched. I., and has awarded the full amount. That seems to me to be perfectly right according to the law as laid down by the House of Lords in *Lysons* v. *Knowles* (*sup.*). The only other point raised was this: It was said that the Judge ought not to have taken the full amount of sixty hours a week for all those weeks. That appears to me to be a question for the Judge. He has to assess the compensation. He is limited only by the maximum mentioned in the schedule, and he has assessed it by reference to the deceased's weekly earnings.

As it seems to me, the matter was entirely within his discretion on the materials before him to say whether he would make any deduction in view of the possibility of the workman's not being able from week to week to work for the whole sixty hours. He has decided the question. We have no jurisdiction to review his decision on a point of fact, and it is impossible to say that he misdirected himself in any way. In the first case, therefore, the appeal, in my opinion, fails on both points.

The second and third appeals raise, I think, actually the same point: In *Wheale* v. *Rhymney Iron Company* the injured man worked every day from Wednesday, August 29, up to and including Wednesday, September 5; that is to say, he worked, in fact, for eight days, including Sunday. His wages were at the rate of 5*s.* 2*d.* a day. The learned County Court Judge gave him compensation on the footing of his working a week of six days at 5*s.* 2*d.* a day. The contention of the employer is that the amount of the man's earnings ought to be divided by two, inasmuch as he was employed for more than one week, and therefore the wages actually paid to him should be averaged by reference to the two calendar weeks in the course of which he earned those wages. That raises the question whether we are bound under these circumstances to divide up the period of his working into two weeks. The employment had no relation to a calendar week, and, as was pointed out by Mr. Vaughan Williams, there is no reference in the Act of Parliament to "calendar weeks." But, apart from that, it seems to me that in such a case as the present, where the actual period of work is less than two weeks, and recourse must be had to the principles laid down in *Lysons* v. *Knowles* (*sup.*), it would be working on an entirely false hypothesis to try to measure the compensation, where the period of work has been less than two actual weeks by the standard of actual facts only. To do so, is to confound the actual with the hypothetical. Where a man has actually worked for two weeks, there is an accomplished fact of history upon which

calculations can be based according to the rule laid down in the schedule. But where the man has not worked for two whole weeks, you are in just the same position in point of law as if you had only a week or less; you must use the actual as a step to the hypothetical, as it seems to me, and not as itself measuring the whole possible earnings. In other words, you are obliged to use the materials before you in forming a conclusion as to what would have been his earnings if he had had the opportunity, which, in fact, he never had, of accomplishing two whole weeks' work. We are not bound here to find that this man accomplished two weeks' work. The intention of the Legislature in passing this Act was that the Court should find out the sum which the workman must be taken to have lost or been prevented from earning in the employment of the particular employer. Since we are entirely emancipated from the necessity of finding an average in fact, the contention is obviously wrong that we must treat the sum earned in a given fraction of a week as the man's week's earnings. What we have to decide is what we may suppose would have been his earnings in a week, or, to put it in what seems to me a better way, what would have been his earnings, taking one week with another, had he had an opportunity of earning them during two weeks or more? In this case the Judge had before him the fact that the man had been in the respondent's employment during seven or eight consecutive days, and in that time had received 5*s.* 2*d.* per diem. He was not in any way fettered in deciding the amount of compensation by any necessity that the workman should have passed two actual weeks in the service of his employer. There was abundant material justifying him in arriving at the conclusion that the amount which the workman was entitled to expect that he would have earned in their service, if he had had the opportunity, was the sum which the learned Judge has decided upon as the workman's weekly earnings—*i.e.* six times his daily wages of 5*s.* 2*d.*

The same reasoning applies exactly to the third case before

us—*Jones* v. *Rhymney Iron Company.* Although the facts are not quite the same, they are practically indistinguishable from the other cases, and I need not refer to them again. But, in this case, a difficulty was raised which, in my judgment, is a great one. It was this: In *Lysons* v. *Knowles* (*sup.*) the House of Lords, as I have stated, affirmed the principle that, in assessing the amount of compensation, the Court is not fettered by the use in the schedule of the word "average" in the expression "average weekly earnings" in cases where there are no materials for finding such an average. In that particular case the House of Lords modified the finding of the County Court Judge by substituting an order based on the hypothesis that the workman in question had worked for parts of two weeks, and by that substituted order they reduced the amount which had been given by the County Court Judge on the hypothesis that the man had worked for only one week. The man had, in fact, worked for two days, one day being, according to the evidence, in one colliery week, and the other day in another colliery week, there being evidence as to the days on which the colliery week began and ended. But it was found as a fact in that case, and the argument was based on that finding, that the man was in no sense a weekly labourer. He was employed for one day, and no inference could be drawn that he would have worked more than one day in the same week in which he actually worked one day, had he had the opportunity of doing so. There being no presumption of that kind, the case was simply one where a man worked on two isolated occasions not sufficiently separated to prevent them from evidencing continuous employment within the meaning of cases decided on this Act, so that they could be treated as forming a continuous employment. But the amount earned was necessarily divided into two, because each day was in fact separated from the other by the custom of the colliery, so as to be in a different week, and there was no presumption of more than a day's labour in any week. Therefore it seems to me not at all inconsistent with the principles laid down that the House

of Lords should modify the decision of the learned County Court Judge in the way they did, by taking as a fact that the earnings of the workman had been 6*s.*, not 12*s.*, in each week. That was all the effect of the order of the House of Lords. It seems to me, therefore, that there is nothing at all in that decision to countenance the view that a man's earnings are to be divided among two weeks if, in point of fact, the period of his employment embraces parts of two different weeks. For the reasons I have given, I do not think that the principle is a sound one, unless we are bound by a decision of the House of Lords to that effect. I think that there was a *primâ facie* difficulty; but when you come to consider it, I think the matter is explainable upon the ground given by Mr. Abel Thomas, and it does not in the slightest degree conflict with the main principle. I wish to make one general observation upon the cases decided in this Court before the decision of the House of Lords in *Lysons* v. *Knowles* (*sup.*). So far as those cases laid down any principle inconsistent with what was laid down in *Lysons* v. *Knowles*, of course they are not now of any authority. Many of those cases, where in point of fact the work done and the wages earned were treated as being done and earned in separate weeks, were placed before the Court and were dealt with by the Court on the footing that it was a condition of compensation under the Act that the workman injured should have been employed for at least two weeks. The question between the parties was dealt with by the Court on that hypothesis, and the Court was willing to do this in favour of the workman, because, as the law was then held to be, it was only if a workman had been in an employment for at least two weeks that he was entitled under the Act to claim compensation for an injury. Therefore I think that no argument should be based upon decisions of this Court previous to *Lysons* v. *Knowles* (*sup.*), in the House of Lords, as establishing a rule where an employment has been, in fact, for a less period than two weeks, that period should be divided in order to get at a two weeks' employment. It is obvious that it

was for the benefit of the workman that an attempt should be made to treat his employment as having been for two accomplished weeks, and this Court was not willing to cut down the right of compensation given by the Act by insisting upon any other view. For these reasons I think that in each of these cases the appeal fails, and should be dismissed.

STIRLING, L.J.: I agree. We have to consider what meaning should be attached to the expression "average weekly earnings" occurring in para. 1 of Sched. I., in cases where the facts do not admit of the full meaning being given the word "average." In dealing with this point we must construe the Act in the light which has been thrown upon it by the decision of the House of Lords in *Lysons* v. *Knowles* (*sup.*). In that case two things were held: In the first place, that the general enactment giving a right of compensation which is to be found at the beginning of the Act is not limited in its operation by the circumstance that the particular case does not fall within the scope of the schedule. Lord Halsbury, L.C., in that case said: "If I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained." Therefore, although the provisions of the first schedule may not exactly apply to the cases before us, yet compensation must nevertheless be awarded and the amount ascertained by analogy from the directions contained in the schedule. In the second place, this word "average" was much considered by the House of Lords, and they were unanimously of opinion that the word is used in para. 1 (*a*) of the schedule in a loose and popular way, and ought not to be construed in its strict sense. Here, again, I will read a few words from what the Lord Chancellor said. He says: "I do not myself feel very much impressed by the discussion that we have had as to what the word 'average' strictly means. I think in ordinary popular

parlance when you talk of a man if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another, or one week with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' that his earnings were so much—not his agreed earnings by contract; there it would be definite—that if a man was only employed at irregular intervals or at irregular amounts, you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid." It is in that way—not in its strict sense—that the word "average" is to be read. Now, in *Ayres* v. *Buckeridge* the workman was employed under an arrangement by which, as it seems to me, and as, I think, the learned County Court Judge found, he was to work for a week at a certain rate per hour. He only worked four days, and on the fourth day met with an accident. How in that case are his "average weekly earnings" to be ascertained? Applying to that expression the meaning attached to it by the Lord Chancellor in the passage which I have just read, the question is what, in ordinary parlance, would be the sum that the man would be said to have been earning per week? The answer to that question is easy, and it must be in the form of the answer that the County Court Judge has given.

The other two cases—viz., *Wheale* v. *Rhymney Iron Company* and *Jones* v. *Rhymney Iron Company*—are very similar. In each case the workman entered into his employment at a fixed rate of daily wages, and worked for eight days. In neither case was a fortnight's work completed, and in strictness one cannot say what the workman's average weekly earnings were; but if the same question be put as I have suggested should be put in the first of these three cases, there is no difficulty in arriving at the same conclusion as the learned County Court Judge. Against this there

was very properly pressed upon us the decision of the Scotch Court in the case of *Cadzow Coal Company* v. *Gaffney* (*sup.*), in which it was laid down that throughout this schedule the word "earnings" must mean "actual earnings." The decision is entitled to great respect, and, moreover, Lord Shand has, I think, expressed an opinion to the same effect, so that one hesitates before taking a contrary view. But upon consideration of the judgment of the Lord Chancellor in *Lysons* v. *Knowles* (*sup.*), which is a judgment from which none of the other learned Lords differed, I think that the better view to take is that which I have tried to explain, and I agree therefore in the judgment which has been delivered by the Master of the Rolls.

MATHEW, L.J.: In *Ayres* v. *Buckeridge* it is clear that it was the duty of the learned County Court Judge to ascertain, if he could, what were the "average weekly earnings" of the deceased workman. In order to answer that question the first inquiry that an ordinary person would make would be whether there was any contract between the workman and his employer. The answer to that would be, "Yes, there was a contract; and the contract was that he was to work for a week for a certain number of hours each day, and was to be paid at so much per hour." In that week he would, therefore, earn a certain definite sum, and that is a fair ground for drawing an inference that his average weekly earnings would be about the same amount. There is nothing in the case to show why the learned County Court Judge should have come to any different conclusion. That is the view he acted upon, and, as appears from the judgment of the Lord Chancellor in *Lysons* v. *Knowles* (*sup.*), especially from that passage which my brother Stirling has just read, he was quite justified in so acting. I do not know where the County Judges would be if they were not entitled to act upon proof of the contract between employer and employed for the purpose of seeing what the workman's earnings were. The assumption that they were his ordinary earnings would be perfectly legitimate in the absence of proof to the contrary

With regard to the other two cases, the position of the workmen in them seems analogous to the position of the workman in the first case. In each case we find a regular course of business, and it is certain that, if he had been able, the man would have worked for more than two weeks. In each case the workman had entered on his second week after earning his first week's wages. Yet, on behalf of the employers, it is contended that the language of the schedule constrains us to come to the conclusion that, if the man had been injured at the end of the first week, his compensation would be higher than if he were injured at the end of the first few days of the second week. It is said that the two sums earned by the workman ought to be put together and divided by two in order to get at his weekly earnings. It is obvious that by doing that you would not arrive at what were his weekly earnings, but would really cut down the amount of his earnings. I therefore agree with my learned brethren that these three appeals must be dismissed. I should like to add, with regard to the order of the House of Lords in *Lysons* v. *Knowles* (*sup.*), that it has been pointed out that the case was one where the employment was irregular, and for only one day in the week.

Appeals dismissed.

Solicitors for the plaintiff in the first case, *Griffith & Gardiner;* in the second and third cases, *Holt Beever & Co.*, for *D. Evans*, Brecon; for the respondent in the first case, *Beyfus & Beyfus;* for the respondents in the second and third cases, *H. P. Becher*, for *Simons & Powell*, Pontypridd.

Also reported in (1902) 1 K. B. 57; 71 L. J. K. B. 28; 85 L. T. 472; 50 W. R. 115; 65 J. P. 804; 18 T. L. R. 20.

November 8, 1901.

BARTLETT *v.* TUTTON (OR SUTTON) & SONS.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

85 *L. T.* 531.

Weekly Earnings—Employment less than One Day.—SCHED. I. 1.

The weekly earnings of an injured workman are, if there be no presumption of continuation of the employment, what he has earned in that employment, and not the ordinary standard weekly wage earned by others engaged in a similar occupation.

THIS was an appeal by the respondents from an award of the County Court Judge at Bristol.

The applicant was a casual dock labourer, who had not previously been employed by the respondents.

On January 2, 1900, he was employed by the respondents in the discharge of a steamer, and worked for them from 11 a.m. to 4 p.m. on that day, when he was injured by accident. He earned by such work the sum of 3*s.* 3*d.*, being at the rate of 6*d.* an hour. The terms of his employment were that he could be dismissed at one hour's notice.

The respondents filed an answer, offering to submit to an award for payment to the applicant of the weekly sum of 1*s.* 8*d.* during incapacity for work.

The County Court Judge gave his decision as follows: The only question I have to decide is as to the weekly sum which, under the provisions of the Act, ought to be awarded to the applicant. The applicant contended that I ought to take the hourly wage of 6*d.*, and multiply that sum by the number of working hours in a week in order to arrive at the applicant's "average weekly earnings." The respondents contended that, inasmuch as 3*s.* 3*d.* was the only sum actually earned by the applicant in the employment of the respondents, I am precluded by the terms of the Act from awarding more than 1*s.* 8*d.* (in strictness 1*s.* 7½*d.*) per week as compensation. In my opinion, I ought not to accede to

either of these contentions. The contention on behalf of the applicant is, in my opinion, wrong, because the applicant, if he had met with no accident, might not have been again employed by the respondents, or at all, during the week following January 2. As regards the contention of the respondents, I am of opinion that I ought not (unless I am bound to do so) to make a nugatory and illusory award by fixing a weekly payment so small as to be in no sense a maintenance for the applicant or any real compensation for the loss of his wage-earning powers: (see the observations of the Lord Chancellor in *Lysons* v. *Knowles* ([1901] 3 W. C. C. 1). The sum of 1*s.* 8*d.* per week would surely be no provision for an injured workman. I have, therefore, to consider what principle I ought to apply to this case. It appears to me to be impossible by any accurate process to arrive at the "average weekly earnings" of a labourer "in the employment of the same employer" when I have before me only the single instance of his pay for casual work during part of a day. In truth, the mind of the draftsman of the 1st schedule does not seem to have been directed to such a case as the one now before me. The view taken of the Act and schedule by the Lord Chancellor in *Lysons* v. *Knowles* (*sup.*) would seem to be that every workman in the prescribed trades is entitled to compensation, and that, if the mode prescribed in the schedule should turn out to be inapplicable, compensation may still be given. Where, as in the present case, it is impossible to calculate the amount of the "average weekly earnings" of the workman in the employment of the same employer, it seems to me to be necessary, in order to carry out the intention of the Act, to make an award, not indeed strictly "in accordance with the 1st schedule" to the Act, but as nearly as may be in accordance with that schedule. For this purpose I have estimated the weekly earnings of a casual dock labourer in this port, taking one week with another, at the sum of 18*s.* I have arrived at this estimate by taking into consideration the rate of wages paid per hour for casual dock labour as proved in this case

and also the notorious fact that in the port of Bristol the employment of a casual dock labourer is not continuous. I accordingly award to the applicant by way of compensation the weekly payment of 9*s.* as from January 17, 1900.

The respondents appealed.

Ruegg, K.C., and *Holman Gregory* for the appellants; *Foote,* K.C., and *Clavell Salter* for the respondent.

COLLINS, M.R.: I am of opinion that the award of the learned County Court Judge cannot be supported. His judgment is a perfectly logical judgment, and he felt that he was pushed to that result by the application of the decision in *Lysons* v. *Knowles* (*sup.*). I do not think that the facts of this case bring it to that extreme position where there is no provision for compensation to be found in the 1st schedule in respect of cases in which the Legislature must have intended that compensation should be paid. In this case a casual dock labourer was employed for the first time by the respondents, and after working a few hours for them he met with the injury by accident for which he claims compensation. The Judge, in his judgment, said that "the applicant, if he had met with no accident, might not have been again employed by the respondents, or at all, during the week following." He was a workman, therefore, with regard to whom there would be no presumption that his employment would last more than one hour. Under those circumstances, this casual dock labourer was paid 3*s.* 3*d.* by the respondents, and it was contended that it was competent for the Judge to give only half of 3*s.* 3*d.* per week as compensation, there being no evidence that the workman would work more than one day in the week, and he having, in fact, worked only part of one day for the respondents. The Judge rejected that contention as being one which gave only illusory compensation. The other contention was that it ought to be worked out how much 3*s.* 3*d.* for part of the day would amount to for a week, but that contention also was rejected. The Judge then acted upon his knowledge and experience of what the average wages of a dock labourer were throughout

the year, and assessed the compensation upon that standard. That decision involves this position, that the workman became entitled to compensation in respect of wages other than those which he had earned or could earn in the same employment. That view leaves out the words "in the employment of the same employer" and "employment by the said employer" in para. 1 (*a*) (i.), and the words "in the employment of the same employer" in para. 1 (*b*) of the 1st schedule. So that, taking that scale of compensation, the cardinal factor for determining the amount of compensation is the wages earned in the employment of the same employer. It is admitted that that factor must be struck out if the plaintiff is entitled to the compensation awarded by the Judge. It seems to me that that factor is vital to the Act, and that it was not intended to give compensation in respect of earnings wherever earned, but only in respect of earnings from the same employer. It is necessary, therefore, to see what is the presumption that this workman would be employed by the same employer, and at what rate of earnings, even when there has been no previous employment by him and it is not possible to take any average. It seems to me that the question is, What has the workman lost by reason of his inability to be employed again by the same employer? We cannot treat him as entitled to recover compensation from this employer upon a computation of what might be earned from other employers. I think that in this case, upon the principles stated in *Lysons* v. *Knowles* (*sup.*), it is possible to form an estimate of the loss to the workman through his inability to serve the same employer. Therefore the applicant does not come within the suggestion which was made in *Lysons* v. *Knowles* (*sup.*) that there may be cases in which there can be no possibility of applying the provisions of the 1st schedule. I think that the present case is really decided by *Lysons* v. *Knowles* (*sup.*). In that case the facts were that Lysons entered the employment of the respondents as collier on a Tuesday and earned 6*s.*; the next day he did not work; on the Thursday he worked and

earned 6*s.*, and was injured; in that colliery the miners' week began on Wednesday and ended on Tuesday night; the applicant was paid as a pieceworker 6*s.* for the Tuesday and 6*s.* for the Thursday. The County Court Judge found as a fact that the applicant worked during one week and earned 12*s.*, and that he was therefore entitled to one-half of 12*s.*, his average weekly earnings, for every week of disablement. In the House of Lords that was altered, and the payment was reduced to 3*s.* a week, because the two sums of 6*s.* each represented two weeks' earnings. That seems to me to establish the principle that under the 1st schedule a compensation of 3*s.* a week can be given, and that it is not illusory. If that is not illusory, compensation of 1*s.* 8*d.* a week is not illusory. It therefore seems to me to be impossible for us, without departing from the decision of the House of Lords in *Lysons* v. *Knowles* (*sup.*), to ignore the connection between the workman and the particular employer, and the compensation must be assessed with reference to the earnings from that employer.

STIRLING and MATHEW, L.JJ., delivered judgments to the same effect.

Appeal allowed.

Solicitors for the appellants, *Hurd & Son*, for *Fussell & Co.*, Bristol; for the respondent, *Ford & Ford.*

Also reported (1902) 1 K. B. 72; 71 L. J. K. B. 52; 85 L. T. 531; 50 W. R. 149; 66 J. P. 196; 18 T. L. R. 35.

November 14, 1901.

WATTERS *v.* CLOVER, CLAYTON & CO.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

18 *T. L. R.* 60.

Week—Weekly earnings.—SCHED. I. 1 and 2.

A trade or working week ended on Thursday night. A man worked six days, from Wednesday to Tuesday, Sunday being excluded. There was evidence that the employment would, but for the accident, have continued.

Held, that the amount earned in the six days might be held to be his weekly earnings.

THIS was an appeal from an award of the Judge of the Birkenhead County Court.

The applicant was a riveter. The question was as to the proper method of ascertaining the average weekly earnings.

The accident happened on December 18, 1900. The applicant had worked for the employers on and off for some years, and from the beginning of the year 1900 till the time of the accident he had not worked for any other employers. But it was agreed between the parties that the period to be taken into consideration for the purpose of ascertaining the average weekly earnings began on December 12, 1900. On that day, which was a Wednesday, he did a day's work at wages of 7*s.* a day. It appeared that he worked under a daily engagement, no notice being required on either side. On the next day, Thursday, he again worked at the same wages, and on the Saturday he received payment of 14*s.* He again worked on the Friday and the Saturday, and on the following Monday and Tuesday, the last-mentioned day being the day of the accident, and he received £1 18*s.* 6*d.* as wages for those four days, on some of which he worked overtime. By the practice of the employers' shipbuilding yard, the working week commenced on Friday morning and

ended on Thursday night, Saturday being pay-day. It appeared that the applicant's average weekly earnings previously to December 12 were £1 10*s.* 8*d.*

The County Court Judge held that, inasmuch as the applicant worked for six days—viz. from December 12 to December 18—and earned for those six days the two sums of 14*s.* and £1 18*s.* 6*d.*, the total of £2 12*s.* 6*d.* was the amount of his average weekly earnings. He made an award for a weekly payment of £1.

The employers appealed, and it was contended on their behalf that, as the amount of wages actually received by the applicant was earned in two trade weeks, his average weekly earnings were half of that sum, viz. £1 6*s.* 3*d.*, and that the highest weekly payment that could be awarded was half of that, viz. 13*s.* 1½*d.*

C. A. Russell, K.C., and *F. Cuthbert Smith* for the employers; *Bray*, K.C., and *Lord* for the applicant.

The COURT dismissed the appeal.

The MASTER OF THE ROLLS said that his judgment in this case must be governed by the course which was taken by the County Court Judge, with the assent of both parties, at the hearing of the arbitration. The County Court Judge was given his choice between two propositions. He was invited by the one side to say that he was bound to divide the period during which the applicant earned the sum on which his average weekly earnings were to be calculated into two weeks. He was invited by the other side to say that he was justified in treating it as one week. The applicant was a riveter who was employed consecutively for six days, which were partly in one week and partly in another. In his opinion, unless there was anything which compelled them to say as a matter of law that there was no presumption that the employment would continue for two weeks, the County Court Judge was, on the evidence before him, entitled to presume that it would continue. Having regard to the case of *Lysons* v. *Andrew Knowles & Sons* in the House of Lords ([1901] 3 W. C. C. 1), and the recently decided

cases of *Ayres* v. *Buckeridge* and *Wheale* v. *Rhymney Iron Company* (*ante*, p. 120), if there was a presumption that the employment would continue, the County Court Judge was justified in taking the amount earned in six days as a fair sample of what the man's weekly earnings were. And it made no difference whether the six days were the whole of one week or whether they were parts of two weeks. Neither was it material for this purpose whether the two weeks, if there were two weeks, were trade weeks or calendar weeks. In his opinion this case fell within the recent decision of this Court. He was dealing with the case strictly with reference to the course taken at the hearing. It seemed to him that there were really other materials for ascertaining this man's average weekly earnings, but in the circumstances those materials were removed from consideration. On the presumption that the employment was continuing, and dealing with the six days in question, the County Court Judge was justified in treating them as a week, and was not bound to divide them into two.

The LORDS JUSTICES delivered judgment to the same effect.

Solicitors: *R. J. Clarke*, Liverpool, for the employers; *H. F. Neale*, Liverpool, for the applicant.

November 8, 1901.

JONES *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Compensation—Amount.—SCHED. I. 1 and 2.

The amount of compensation recoverable is not limited to half the difference between the earnings before and after the accident.

Pomphrey v. *Southwark Press* ([1901] 3 W. C. C. 194; [1901] 1 Q. B. 86) considered.

THIS was an appeal by the applicant from the award of

his Honour JUDGE OWEN sitting at the Tredegar County Court on February 12, 1901.

The Judge's note was as follows: The only question in dispute was as to the amount of the weekly sum to which the applicant was entitled. After hearing evidence, I found as facts: (1) That the applicant's average weekly earnings before and on November 20, 1899, the date of the injury, was 42*s.* This fact was not disputed. (2) That the average amount which the applicant was on February 12, 1901, able to earn was the weekly sum of 20*s.* at least. The applicant was not then in work, and he had not sought to get work. The respondents had offered him work, which I thought he was able to do, at weekly wages of 24*s.*; but the applicant refused to take such work, upon the ground that the amount of such weekly wages was not sufficient. In accordance with the judgment of Collins, L.J., in *Pomphrey* v. *Southwark Press* ([1901] 1 Q. B. 86, at p. 91), I made an award in favour of the applicant of the weekly sum of 11*s.*, being one-half of the difference between the applicant's wages before and at the time of the accident and what he was at the date of the award able to earn.

Asquith, K.C., and *Edmond Browne*, for the appellant: The learned Judge has decided as a point of law that he cannot award more than half of the difference between the amount earned before and after the accident. The maximum allowed by paras. 1 and 2 of the 1st schedule of the Act is half the amount earned before the accident, regardless of what is earned subsequently. The award was founded upon the judgment of the present Master of the Rolls in *Pomphrey* v. *Southwark Press*, as reported in the Law Reports ([1901] 1 Q. B. 86, at p. 91), which contains the following passage: "I take it to be clearly settled that the maximum amount which the injured workman can claim is to be measured by the difference between his earnings before the accident and what he can earn after it. The maximum that can be awarded is the difference so ascertained."

[The MASTER OF THE ROLLS: I do not think that that is

what I said. It is inconsistent with the preceding part of my judgment.]

I have here another report of that case ([1901] 3 W. C. C. 194) which is the report as appearing in the Law Times Reports. Your Lordship, according to that report, appears to have said: "I think the result of that case (*Irons* v. *Davis & Timmins*, [1899] 1 W. C. C. 26), when it is fairly applied, is that the maximum amount of compensation to which a workman can be entitled is the difference between his average weekly earnings before the accident and what he can earn afterwards, and that the fund out of which that compensation is payable is one-half of the average weekly earnings before the accident." I submit that that is the more correct exposition of the law.

[The MASTER OF THE ROLLS: Yes. That must have been what I said. The other would not be correct.] *

Ruegg, K.C., and *Minton-Senhouse*, for the respondents: It was within the Judge's discretion to make the award that he did, and it is not clear that he acted upon the dicta of the Master of the Rolls in *Pomphrey* v. *Southwark Press* as reported in the Law Reports. In fact he had before him the cases of *Illingworth* v. *Walmsley* ([1900] 2 W. C. C. 118) and *Geary* v. *Dixon* (36 S. L. R. 640).

The MASTER OF THE ROLLS said that he thought the Judge had made his award upon an erroneous view of the law, and had not exercised his discretion upon the facts. The case must go back for a reassessment of compensation.

Solicitors for the appellant, *Pattinson & Brewer*; for the respondents, *C. H. Mason*.

Not elsewhere reported.

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* The report in the Law Reports has been corrected (1902) 1 K. B. 61, *n*.

June 9, 1902.

MORTON & COMPANY (LIMITED) *v.* WOODWARD.*

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 878.

Review—Time from which Payments may be affected.—SCHED. I. 12.

An arbitrator has jurisdiction to make an order affecting weekly payments as from a date prior to that of the hearing of a request for a review under Sched. I. 12.

THIS was an appeal by the plaintiffs from an order made by the Judge of the Liverpool County Court, under the Workmen's Compensation Act, 1897, upon an application by them to review the weekly payments they were making as compensation to the defendant, a workman who had been injured by accident in the course of his employment by them.

On May 14, 1901, the workman, who was a riveter, met with an accident while riveting boilers, by which he lost the sight of one eye.

On August 28 his employers agreed to pay him 18*s.* 3*d.* a week, being the amount of half his weekly earnings, as compensation under the Workmen's Compensation Act, 1897; and a memorandum of this agreement was registered under para. 8 of Sched. II. of the Act.

On September 2 a Dr. Stephenson examined the workman

* It is difficult to edit this report. Prior to August 30, when it was published, the case had not even been mentioned in print, except in the Law Reports. As there reported it is misleading and mischievous. Through the courtesy of Messrs. Jones, Billson & Co., of Liverpool, I have seen the documents and notes of the case, and am thereby enabled to append some notes and explanations. The root of the evil lies in confounding the effect of a report and of a certificate of a medical referee. A report is a privileged document obtained by, and for the sole benefit of, the arbitrator (see "Accidents to Workmen," at p. 246). It is not evidence, and it is not binding upon any one. A certificate is obtained by the work man, and by him only, and is conclusive evidence of his condition.

on behalf of the employers, and certified that in his opinion the workman's incapacity to work had ceased.

On November 12 the employers filed an application under para. 12 of Sched. I. for a review of the weekly payment, on the ground that the workman's incapacity had ceased. Up to this date they had paid him the agreed weekly payments, but on filing their application for a review they stopped these payments.

On December 13 the application came on for hearing.

The certificate of Dr. Stephenson was produced and tendered as evidence, but the workman stated that he had not been previously informed of the contents of the certificate, and that he was not satisfied with it.

Dr. Stephenson was called and gave evidence, but the County Court Judge said * that the evidence before him was insufficient, and thereupon, under para. 11 of Sched. I.,† referred to a Dr. Shears, a medical referee, the question: "Whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment?"

To this reference the Judge appended the certificate ‡ of Dr. Stephenson, given on September 2.

* It does not appear that the Judge did say that the evidence before him was insufficient. This error crept into the case in the Court of Appeal by reason of some unnecessary recitals in the printed form of reference not having been struck out. The following shows by the italics the words in that form that are not only unnecessary, but which should have been struck out: "*having heard the evidence tendered by both parties*, hereby certify that in my opinion *the medical evidence given before me is insufficient* on a matter which seems to me to be material to a question arising in the above-mentioned arbitration, and that it is desirable to obtain a report from a medical referee on such matter, as follows." The learned Judge apparently thought that the workman ought to have an opportunity of rebutting Dr. Stephenson's evidence. This could have been done by an adjournment, when the workman could have submitted himself to a private practitioner, or to a medical referee. Instead of adopting that course, the Judge himself referred the question for a report under Sched. II.

† This should be para. 13 of Sched. II.

‡ This certificate was "put in" at the hearing. It would not have been evidence save by consent.

On January 2, 1902, Dr. Shears made the following report; John William Woodward's remaining right eye has good sight, and is free from disease. In my opinion a one-eyed man runs a slight additional risk to this eye in a dangerous occupation such as that of a boiler-maker; if, however, the parties concerned have decided to incur this slight risk, I see no reason why J. W. Woodward should not at once return to his former occupation. I am of opinion that for some weeks J. W. Woodward will not be restored to his full earning capacity, and for the following reason: Owing to the loss of one eye he will have difficulty in correctly judging of the distance of objects. This would particularly apply to the striking of a rivet with a hammer; but with practice this awkwardness will disappear, and he will learn to correctly judge of distances with his one eye. As a one-eyed man he would probably experience more difficulty in obtaining work from new employers.

On April 11 the case came on again for hearing, and the County Court Judge made an award as follows: "I find that the respondent, John William Woodward, has been since September 2, and now is, able to earn the same amount of wages as he had earned previously to the application for arbitration herein, and I order that the weekly payment of 18*s.* 3*d.*, payable to the respondent under the agreement of August 28, 1901, . . . be diminished to the weekly sum of one penny as and from April 16th instant; but this award is made without prejudice to the rights and remedies of the respondent under the said agreement for the arrears of the weekly payments up to April 16th instant inclusive."

From this award the employers appealed.

Ruegg, K.C., and *Leslie F. Scott* for the employers; *Bankes*, K.C., and *W. Greaves Lord* for the workman.

COLLINS, M.R.: In this case the workman was a riveter, and in the course of his employment he met with an accident which resulted in the loss of the sight of one eye. His employers came to an agreement with him by which they agreed to pay him a weekly sum as compensation, and a

memorandum of this agreement was registered under the Act. Then a time came when the employers contended that the workman was fully restored to his capacity for earning wages. The workman disputed that. In November, 1901, the employers filed an application in the County Court, under para. 12 of the first schedule to the Workmen's Compensation Act, 1897, for a review of the agreed weekly payment. The application was heard in December, when it appeared that in the previous September the workman had submitted to a medical examination at the instance of the employers, but that the result of the examination had not been communicated to him. When the doctor's certificate was read at the hearing of the employers' application, the workman expressed dissatisfaction with it. Thereupon the County Court Judge, acting under the provisions of the Act, submitted the matter to a medical referee to report upon. The terms of the reference were that the medical referee should report "whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment." The Judge appended to this reference the certificate that had been given by the doctor after the medical examination in September. On January 2, 1902, the medical referee made a certificate,* in which he pointed out certain lingering incapacities, or drawbacks to full capacity, from which the workman continued to suffer with regard to the work which he had formerly been accustomed to do. In April the County Court Judge resumed the hearing of the employers' application, and he then made the award against which the employers have now appealed. The County Court Judge found as a fact that the workman had not been incapacitated since the medical examination in September, 1901, up to the date of the hearing of the employers' application; and, while he saved intact the rights of the parties as to the obligation of the employers to pay compensation, he merely reduced the compensation to be paid after April, 1902, to a

* This should be "report."

nominal sum. The County Court Judge seems really to have been of opinion that he had no jurisdiction to deal with the question at what date the workman's incapacity ceased before the date of the hearing of the application. In that opinion I think the learned Judge was wrong. When the application was made by the employers, the dispute was whether the workman, in consequence of any incapacity from his injury, was then entitled to the agreed compensation. The delay in the hearing did not affect the employers' right to have that question decided, though the delay may have made it a more difficult question to decide. The certificate * of the medical referee was not necessarily conclusive as to the condition of the workman at the previous date. The scheme of the Act is that compensation is to be given during the period of a workman's incapacity to earn his usual wages. The essential thing to find out in this case was the workman's capacity at the time when the dispute between him and his employers was formulated. It was formulated when the application was made in the County Court. It seems to me that the learned Judge did not address himself to find out that. The evidence given at the first hearing cannot, according to his own record,† be taken as conclusive. If it is not conclusive, how are we to know at what date the incapacity ceased? He has himself said that the medical evidence was insufficient.† It was, however, the only ‡ evidence on which he could find at what date the incapacity had ended. Therefore it seems to me that neither side is right, and the question still remains to be decided at what date the workman's incapacity ceased. The case must, therefore, be sent back to the County Court Judge. The learned Judge was not precluded by the delay in the hearing of the application from deciding what was the condition of the workman when the dispute was formulated, and making

* This should be "report."

† See note (*), *ante*, p. 144.

‡ He had before him on the second occasion the report, and in effect found that Dr. Stephenson's evidence was true.

his award accordingly. The appeal must therefore be allowed.

MATHEW, L.J.: I am of the same opinion. The delay that took place in the hearing ought not to prejudice either side, and, according to the decision of the learned County Court Judge, it does prejudice the employers, as they are treated as liable up to the date of the final decision. The question for the Court was whether the workman's incapacity had ceased at the time when the employers initiated proceedings in November. The question referred by the learned Judge to the medical referee was not the same as that which the learned Judge had himself to dispose of. The question referred to the referee was only what was then the condition of the workman. He reported that the man's incapacity had been diminished, but had not been entirely god rid of. The question still remained for the County Court Judge to determine at what date the incapacity had been so much diminished that the amount of the compensation ought to be reduced. The workman was called, and was asked whether he was capable of working, and objection was made that on that point the certificate * of the medical referee was conclusive.† It was not conclusive on the point which the learned Judge had to consider.† That being so, he was wrong in holding that he had no jurisdiction to decide the point. I agree that the case must go back to him to say at what date the incapacity ceased.

COZENS-HARDY, L.J.: I agree. The question for the County Court Judge was whether at the date of the initiation of the proceedings the workman's incapacity to work had ceased. On that question he was bound to hear evidence. The report of the medical referee was only as to the workman's condition on January 2, 1902. That may throw light, no doubt, on his condition at the earlier date; but I see nothing in the Act to make it the sole admissible evidence ‡

* This should be report."

† A certificate would have been conclusive; the report was not.

‡ A report is not evidence. See "Accidents to Workmen," at p. 246.

as to the condition of the man at an antecedent date, or even at the subsequent date when the matter comes on for decision. All that I need now decide is that the learned County Court Judge had jurisdiction, if he thought fit, to review the payment to the workman as from the date of the employers' application.

Appeal allowed.

Solicitors for the employers, *William Hurd & Son,* for *Oliver Jones, Billson, & Co.,* Liverpool; for the workman, *Helder, Roberts, & Co.,* for *H. F. Neale,* Liverpool.

Also reported (1902) 2 K. B. 27; 71 L. J. K. B. 736; 86 L. T. 878.

March 29, 1901.

OSBORNE OR McKINNON *v.* BARCLAY, CURLE, & COMPANY.

Before Earl of HALSBURY, L.C., Lords DAVEY, MORRIS AND KILLANIN, SHAND, ROBERTSON, and LINDLEY.

85 *L. T.* 286.

Appeal from Court of Sessions, Scotland.—SCHED. II. 4.

The decision of the Court of Session is final, and no appeal lies from it.

THIS was an appeal from the Court of Session in Scotland.

W. Campbell, K.C. (of the Scotch Bar), for the respondents; *Shaw,* K.C. (of the Scotch Bar), for the appellant.

The LORD CHANCELLOR: We are all of opinion that this appeal is incompetent. Whatever may have been the reason for it, we think that the Legislature has conferred the jurisdiction upon the Sheriff Court under circumstances and in language which render it impossible to say that any appeal to this House is competent now. That may, and I think it does, render the observation which was made at the Bar a

just and true one—namely, that it seems a somewhat anomalous condition of things that there should be an appeal in similar cases to this House from the English Courts, and yet none from Scotland. But that, after all, is only one of the anomalies which may be created by different legislation. We must construe the language as it stands here with reference to the subject-matter dealt with, and we are all, as I have said, of opinion that the appeal is incompetent.

The other noble and learned Lords concurred.

Appeal dismissed with costs.

Solicitors for the appellant, *William Robertson & Co.*, for *J. & J. Gallethy*, Edinburgh, and *J. M. & J. H. Robertson*, Glasgow; for the respondents, *Leslie Field*, for *Morton, Smart, & Macdonald*, Edinburgh, and *Biggart & Lumsden*, Glasgow.

Also reported in (1901) A. C. 269; 85 L. T. 286; 38 S. L. R. 611.

June 24, 1902.

REX *v.* OWEN (His Honour Judge) AND ROBERTSON.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

18 *T. L. R.* 701.

District—Scotland.—SCHED. II. 9 and 14.

The expression "district" in Sched. II. 9, includes the district of a Sheriff Court in Scotland.

IN this case a rule had been obtained calling upon the Judge of the Newport, Mon., County Court, to show cause why he should not hear an application for arbitration.

Lush, K.C., and *Bailhache* showed cause on behalf of Robertson; *Bankes*, K.C., and *Parsons* appeared for the applicant; and *Bonsey* for the County Court Judge.

This application raised the question as to the meaning of "district" in Sched. II. 9.

The workman was injured while at work on a wharf on

the river Usk, which was within the jurisdiction of the Newport County Court.

The respondent was a shipowner carrying on business in Glasgow, and neither residing nor carrying on business in England or Wales.

It was contended on behalf of the respondent that "district" in the Act meant district within the jurisdiction of the English (which include Welsh) County Courts, and that consequently he was not subject to the jurisdiction of the Judge of the Newport County Court. The point had been dealt with, but not decided, by the Court of Appeal in the case of *Haddock* v. *Fisher* ([1900] 2 W. C. C. 43).

The learned Judge decided in the respondent's favour, and refused to hear the arbitration, but, to save a further application, assessed compensation.

The LORD CHIEF JUSTICE said he had no doubt that the Act applied to all parts of the United Kingdom, and that all employers were meant to be made liable, and that they ought to give effect to the Act. Sched. I. 16 and 17, and Sched. II. 14, 15, and 16, dealt with Scotland and Ireland, and showed that these areas were included in the Act, merely dealing with matters peculiar to them. Therefore the words "Sheriff's Court" must be read into Sched. II. 9. If "district" meant "County Court district" only, there must have been a definition of its meaning in Scotland, which the Act does not contain. He thought that the parties here did reside in different districts. The case of a foreign or English employer living abroad need not be considered now. When the parties resided in different districts within the ambit of the Act of Parliament, the provisions as to service, etc., without the jurisdiction would apply. The rule must be made absolute.

DARLING, J., concurred.

CHANNELL, J., said the question was, could they get enough out of Sched. II. 9, to decide the point? "District" was not a technical word, and was the area over which the County Court Judge and the Sheriff have jurisdiction. The

County Court has no power to serve notice, etc., out of the jurisdiction unless the power is conferred. Rule 15, 2, of the W. C. R. provides for such service by registered letter, which could, of course, be sent to Scotland. He concurred in the judgment of the Court.

Rule made absolute.

Solicitors: *Helder, Roberts, Walton, & Thomas,* for *Frank Lewis,* Newport (Mon.), for the applicant; *Botterell & Roche,* for *Vaughan & Roche,* Cardiff, for the respondent.

Also reported in (1902) 2 K. B. 436; 71 L. J. K. B. 770; 18 T. L. R. 701.

June 4, 1902.

CLATWORTHY *v.* R. & H. GREEN (LIMITED).

Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

86 *L. T.* 702.

Letters of Administration—Stay of Proceedings—Payment into Court—Application for Costs.—RULE 5, 3.

The stay of proceedings referred to in Rule 5, 3, does not debar an application for costs. The costs of such an application are in the discretion of the arbitrator.

It is not necessary for a dependant to take out letters of administration to the estate of the deceased.

THIS was an appeal by the respondents from an order made by the Judge of the Bow County Court. The facts sufficiently appear from the judgment.

Powell, K.C., and *Addington Willis* for the appellants.

Chester Jones, for the applicant, was not called upon.

COLLINS, M.R.: This is an appeal from an order of a County Court Judge by which, in the exercise of his discretion, he directed that the respondents should pay to the applicant the costs of her application up to the date when the respondents paid money into Court. The case seems to

me to be a very simple one when the facts are clearly understood, and I think there is no ground whatever for the respondents' appeal. The applicant is the widow of a workman who died from the effects of an accident which happened while he was in the employment of the respondents. He died intestate, leaving a widow and children. The respondents admitted that they were liable to pay compensation under the Act, and there was no dispute as to the amount, but they refused to pay it to the widow unless she first took out letters of administration. She declined to do that, and made an application for compensation on behalf of herself and her children. Now, in my opinion, the respondents had no right to insist on the widow taking out letters of administration as a condition precedent to their paying her the amount of compensation which it was agreed that they were liable to pay. She was consequently obliged to commence proceedings under the Act to obtain the sum she was entitled to. The respondents then paid £300 into Court, and thereupon, under Rule 5, 3, further proceedings against them were stayed. But how about the costs up to the date of the payment into Court? Para. 6 of the second schedule provides that: "The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator." Now, the facts were that the widow was willing to accept the respondents' offer of compensation except so far as they made a condition, which they had no right to make, before they paid her the money. She was therefore entitled to take proceedings under the Act to enforce her claim. The County Court Judge in these circumstances seems to me to have been perfectly justified in awarding her the costs of her application up to the date of the payment into Court. But then it was said that he had no jurisdiction to make any such order, because on the money being paid into Court all further proceedings against the respondents were stayed. I think it is impossible to say that the provisions of Rule 5, 3, negatived the right of the Judge to deal with the costs necessarily incurred by

the applicant in order to get payment of the compensation which she was entitled to.

MATHEW and COZENS-HARDY, L.JJ., agreed.

Appeal dismissed.

Solicitors for the applicant, *Shaen, Roscoe, Massey, & Co.*; for the respondents, *Treadwell & Aylwin.*

This decision overrules the law laid down in *Brown* v. *London and North-Western Railway Company* ([1899] 1 W. C. C. 147).

Also reported in 86 L. T. 702: 50 W. R. 610.

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